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No.

IN THE
Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS,
Individually and on Behalf of Others
Similarly Situated,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cost-of-living adjustment that a defined benefit pension plan has the discretion to provide to participants who elect to receive their benefits as a monthly annuity payment and that is explicitly excluded from the plan's definition of "accrued benefit" nevertheless constitutes part of every participant's "accrued benefit" under ERISA, 29 U.S.C. § 1002(23)(A), and therefore must also be provided to participants who select a one-time lump-sum distribution of their benefits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Rohm and Haas Pension Plan has no parent company and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rohm and Haas Pension Plan ("Plan") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 497 F.3d 710. Pet. App. 1a. The order denying the petition for rehearing and rehearing en banc is unreported. *Id.* at 42a. The opinion of the United States District Court for the Southern District of Indiana is unreported. *Id.* at 9a.

JURISDICTION

The court of appeals filed its opinion on August 14, 2007. It denied petitioner's timely petition for rehearing and rehearing en banc on October 10, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C. § 1002 provides, in relevant part:

§ 1002. Definitions

. . . .

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age . . . .

STATEMENT

This case affords the Court the opportunity to resolve an irreconcilable split among the lower courts regarding the definition of "accrued benefit" under the Employee Retirement Income Security Act ("ERISA")—a question that this Court has acknowledged to present "complicated and important issues pertaining to the private pensions of millions of workers." *Mead Corp. v. Tilley*, 490 U.S. 714, 726 n.11 (1989). In the decision below, the Seventh Circuit held that a cost-of-living adjustment ("COLA") available under the terms of the Plan to participants who elect to receive their benefits as a monthly annuity payment is part of the Plan participants' "accrued benefit"—even though the Plan's provisions explicitly *exclude* the COLA from the definition of "accrued benefit"—and that the COLA must therefore be provided to every participant in the Plan, including those who select a one-time lump-sum distribution of their benefits. The Seventh Circuit's conclusion that a COLA is *per se* a component of a plan participant's "accrued benefit" is directly at odds with decisions from the Fourth and Ninth Circuits holding that a COLA is only a component of a participant's "accrued benefit" where the terms of the plan so provide, and with the definition of "accrued benefit" under ERISA, which expressly states that an "individual's accrued benefit" is to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

The Seventh Circuit's decision disregards the unambiguous terms of the Plan and unilaterally expands the benefits available to participants beyond those they could reasonably have expected to receive under the Plan. In so doing, the decision exposes defined benefit pension plans to new and unforeseen financial liabilities that may leave many such plans

chronically underfunded and may compel some employers to terminate their plans altogether.

Certiorari is warranted to resolve the lower courts' pervasive disagreement regarding the definition of "accrued benefit" under ERISA, to reconcile the decision below with ERISA's plain statutory language, and to ensure that defined benefit pension plans—many of which are already facing significant funding shortfalls—are not saddled with new liabilities that employers never agreed to assume and may be unable to absorb.

1. Congress enacted ERISA to "protect[ ] employees' justified expectations of receiving the benefits their employers promise them." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). As an initial matter, "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). If an employer does decide to establish a pension plan, however, that plan must comply with the employee participation requirements, funding standards, and fiduciary obligations imposed by ERISA. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 n.5 (1981). ERISA therefore "mak[es] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

ERISA recognizes two principal categories of pension benefit plans. Under a defined contribution plan, "the employer's contribution is fixed and the employee receives whatever level of benefits the

amount contributed on his behalf will provide." *Ala. Power Co. v. Davis*, 431 U.S. 581, 593 n.18 (1977). In contrast, under a defined benefit plan, "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Id.* Under the defined benefit model, "the employer typically bears the entire investment risk and . . . must cover any underfunding as a result of a shortfall that may occur from the plan's investments." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (internal quotation marks omitted). Because the accrued benefits under a defined benefit plan cannot be reduced, economic downturns and unforeseen liabilities can complicate employers' efforts to maintain an adequately funded plan. Indeed, funding shortfalls have recently compelled a large number of companies to terminate their plans altogether. *See, e.g., US Airways Reaches a Deal over Terminated Pensions*, N.Y. Times, Aug. 27, 2005, at C3.

The concept of an "accrued benefit" is central to the protections that ERISA provides to plan participants. For defined benefit pension plans, ERISA defines the "accrued benefit" as an "individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). A participant's accrued benefit is protected by ERISA's "anti-cutback rule," which "prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.'" *Heinz*, 541 U.S. at 741 (citing 29 U.S.C. § 1054(g)).

The default means of distributing the accrued benefit to a participant in a defined benefit pension plan is through monthly annuity payments commencing at normal retirement age and continuing for

the remainder of the participant's life. Some plans also provide participants with the option of selecting a one-time lump-sum distribution of their accrued benefit. That lump-sum payment must be the "actuarial equivalent" of the accrued benefit expressed in the form of a single-life annuity. 29 U.S.C. § 1054(c)(3).[1]

2. Rohm and Haas Company sponsors a defined benefit pension plan, which provides its employees with retirement benefits based on their years of service and compensation. Pet. App. 2a. The Plan affords participants several payment options. *Id.* As required by ERISA, the default payment options are a single-life annuity for an unmarried participant or a qualified joint and survivor annuity for married participants, which provide participants with a monthly benefits payment for the remainder of their lives. *Id.* at 44a, 45a. Other payment options include a one-time lump-sum distribution of benefits, which is calculated by determining the present value of the participant's accrued benefit using the actuarial assumptions set forth in an appendix to the Plan. *Id.* at 57a.

Although not required by ERISA to provide enhanced benefits to account for changes in the cost of living, the Plan provides that monthly annuity pay-

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[1] Treasury regulations provide guidelines for determining the "actuarial equivalent" of the accrued benefit. *See* Treas. Reg. § 1.411(a)-11. The "actuarial equivalent" is generally determined by using established mortality tables to calculate the accrued benefit that the participant would have received had he elected the monthly annuity and then discounting that amount to its present value on the date of the lump-sum distribution.

ments made after the age of sixty can be increased annually—through a COLA capped at 3%—to offset inflation. Pet. App. 59a. The COLA is not included in the sections of the Plan that define a participant's "accrued benefit." The COLA is instead found in a wholly different section of the Plan—entitled "Cost-Of-Living Adjustments To Pensions"—which provides that a participant "receiving monthly payments[ ] shall be entitled to an annual Cost-of-Living Adjustment." *Id.*

The COLA's exclusion from a participant's accrued benefit is reiterated in the Summary Plan Description, which provides:

> ***What is a "COLA" and am I eligible to receive it?*** The cost of living adjustment or "COLA" is an annual adjustment to monthly payments from the Plan intended to keep pace with inflation. . . . The COLA only applies to monthly payments; it does NOT apply if you receive your benefit in the form of a cash lump sum. The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law. . . .

Pet. App. 68a-69a. The Plan therefore informs participants in unambiguous terms that the COLA is excluded from the definition of "accrued benefit" and is not available to participants who select a lump-sum distribution of their benefits.[2]

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[2] It is undisputed that the Plan does not define the COLA as part of a participant's "accrued benefit." *See* Pet. App. 4a ("The parties agree that the plain terms of the Plan exclude the COLA from a participant's accrued benefit."). An examination

3. Respondent was employed by Rohm and Haas Company from 1969 until he was terminated in 1997. Pet. App. 3a. Upon his termination, respondent chose to receive his pension in a one-time lump-sum distribution of $47,850.71. *Id.* Seven years later, he filed suit in the United States District Court for the Southern District of Indiana, alleging that the Plan had violated ERISA by failing to include in his lump-sum distribution the present value of the COLA that he would have received had he selected

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[Footnote continued from previous page]

of the Plan confirms that the COLA is not a component of the "accrued benefit" under the terms of the Plan. Section 3.1 of the Plan defines "Accrued Benefit" as "that portion of a Participant's Basic Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date." Pet. App. 44a. Section 7.1 provides the formula for the Basic Amount of Normal Retirement Pension in terms of level of compensation and years of service. *Id.* at 45a. The COLA is not part of the Section 7.1 formula. Nor is the COLA referenced anywhere in Article XI, which governs the Amount of Pension Payable at Retirement. *Id.* at 55a. Moreover, Section 12.1.4 of the Plan defines a "lump sum distribution" as an optional form of retirement benefit to be "determined in accordance with Appendix D." *Id.* at 57a. Appendix D, in turn, presents interest rates and mortality tables, but does not reference the COLA. *Id.* at 62a.

The COLA is set forth in a separate Article XV that follows—and makes no reference to—the Article VII formula for the Basic Amount of Normal Retirement Pension and the Article XI provisions regarding the amount of pension payable at retirement. Pet. App. 59a. The COLA is not available to all participants, but is instead restricted to retirees over the age of sixty "who [are] receiving monthly payments." *Id.* The COLA thus applies only after a participant has already selected an annuity and is actually receiving monthly payments.

the monthly annuity option. The district court certified a class comprised of former Plan participants who received a lump-sum distribution that did not take a COLA into account. *Id.*

The parties filed cross-motions for summary judgment on the legal issue whether the COLA was part of the Plan participants' accrued benefit under ERISA, and the district court granted respondent's summary judgment motion. Pet. App. 3a. The district court held that "the Plan's definition of 'Accrued Benefits' does not satisfy ERISA's definition of that term because the COLA enhancement was not included when calculating the value of his lump sum distribution." *Id.* at 40a. The district court nevertheless "acknowledge[d] that substantial complications in administering such a provision may result" from its decision because "COLAs are typically both speculative and contingent, turning on future economic tides which are unknowable at the time a lump sum payment is made." *Id.* In light of these practical complications and the legal uncertainty surrounding the issue, the court certified the question for interlocutory appeal.

4. The Seventh Circuit granted leave to appeal and affirmed. The court acknowledged that "ERISA itself . . . look[s] at the individual plan's terms in order to discern the accrued benefit" and that the Plan defines "the COLA to be an enhancement that is awarded to annuitants, over and above the accrued benefit." Pet. App. 5a, 6a. The court of appeals nevertheless relied on its earlier decision in *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992), to hold that the "term 'accrued benefit' has a statutory meaning, and the parties cannot change that meaning by simply labeling certain benefits as 'accrued benefits' and

others, such as the COLA, as 'supplementary benefits.'" Pet. App. 6a-7a (citing *Hickey*, 980 F.2d at 468). The Seventh Circuit reasoned that—regardless of whether the terms of a plan exclude a COLA from the definition of "accrued benefit" or make payment of a COLA discretionary—a COLA paid to participants who receive monthly annuity payments is always encompassed by the "statutory meaning" of "accrued benefit" because "the 'accrued benefit' is that benefit a participant would be entitled to if he chose to receive it in the form of a single-life annuity." *Id.* at 5a. The court therefore concluded that, "[i]f a defined benefit pension plan entitles an annuitant to a COLA, it must also provide the COLA's actuarial equivalent to a participant who chooses instead to receive his pension in the form of a one-time lump sum distribution." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit held that a COLA offered by a defined benefit pension plan is *always* part of a participant's accrued benefit, even if expressly excluded from the plan's definition of that term. The Seventh Circuit's categorical approach to defining "accrued benefit" squarely conflicts with decisions in which other circuits have used a case-by-case inquiry dependent on the terms of the specific plan at issue to define a participant's accrued benefit. In light of the circuits' conflicting approaches to defining one of ERISA's most fundamental terms—and the undeniable "importan[ce]" of this issue "to the private pensions of millions of workers" (*Mead Corp. v. Tilley*, 490 U.S. 714, 726 n.11 (1989))—this Court's review is warranted.

In the specific context of COLAs, the Fourth and Ninth Circuits have both endorsed the case-by-case

approach explicitly rejected by the Seventh Circuit. *See Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599 (4th Cir. 2003); *San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994). Those courts look to the terms of the plan at issue to determine whether a COLA is a component of a plan participant's accrued benefit. This case would have been decided differently in either of those circuits because the terms of the Rohm and Haas Pension Plan unambiguously exclude the COLA offered to monthly annuitants from the definition of "accrued benefit." Such interpretive inconsistency immeasurably complicates the task of plan actuaries and substantially undermines the uniform regulatory regime that Congress sought to establish when it enacted ERISA.

If left undisturbed, the decision below will have profound—and potentially devastating—consequences for defined benefit pension plans. The decision compels those plans funded on the actuarial assumption that a COLA provided to monthly annuitants is not a component of the participants' accrued benefit to begin providing the COLA to all participants and, through the operation of the anti-cutback rule, prohibits those plans from thereafter reducing the COLA's amount. As evidenced by recent congressional efforts to shore up the pension system, many defined benefit pension plans are already significantly underfunded. The imposition of this new and unforeseen liability will place additional financial burdens on these plans and their employer sponsors—to the substantial detriment of the millions of workers who rely on such plans to fund their retirements.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' INTERPRETATIONS OF THE TERM "ACCRUED BENEFIT" UNDER ERISA.

The Seventh Circuit's holding that a COLA is *per se* a component of the "accrued benefit" provided by a defined benefit pension plan—regardless of the terms of the plan itself—is directly at odds with decisions from the Fourth and Ninth Circuits utilizing a case-by-case approach that looks to a plan's terms to determine whether a COLA constitutes part of a participant's "accrued benefit."

A. In *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner*, 318 F.3d 599 (4th Cir. 2003), the Fourth Circuit held that a COLA did not constitute an "accrued benefit" for participants who retired before the COLA had been implemented because the terms of the plan in effect at the time of the participants' retirement did not provide for a COLA. *Id.* at 605. Construing the definition of "accrued benefit" in the Internal Revenue Code—which is substantively identical to ERISA's definition of "accrued benefit"—the court explained that the "definition does not purport to describe what counts as an 'accrued benefit' for *all* participants in *all* qualifying plans. Rather, the statutory definition is a signpost directing us to look to the terms of the plan at issue." *Id.* at 602-03 (citing I.R.C. § 411(a)(7)(A)(i)) (emphases added).[3] When

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[3] I.R.C. § 411(a)(7)(A)(i) provides that "the term 'accrued benefit' means . . . in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age." The Internal Revenue Code imposes a number of requirements that

the Internal Revenue Code "refers to 'accrued benefit,'" the court continued, "it refers to a benefit created by the accumulation of contributions and limited in its form of payment as '*determined under the plan*,' . . . but it does not describe what a given plan participant's accrued benefit would be. The statute leaves this level of detail to plan drafters." *Id.* at 603 (emphasis in original). Because the "plan drafters" had not provided for a COLA at the time that the relevant group of participants retired and "[t]he Plan . . . state[d] quite clearly that retirement benefits are determined by the terms in effect 'at the time the Participant separates' from service," the COLA that was implemented after the participants' retirement was not part of their accrued benefit and thus was not subject to the protection of the anti-cutback rule. *Id.* at 604. "[T]he security provided by" that rule, the court explained, "is bounded by the terms of the plan in that the plan defines the benefits promised." *Id.*

Similarly, in *San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994), the Ninth Circuit held that a COLA was

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mirror those in Title I of ERISA, which a plan must satisfy in order to qualify for favorable tax status, including tax deferral of participants' benefits until they actually receive distributions. *See also Musmeci v. Schwegmann Giant Super Mkts., Inc.*, 332 F.3d 339, 345 (5th Cir. 2003) ("the interconnection between ERISA and the IRC reflects an intent to use common terminology").

not a component of the plan participants' "accrued benefit" because, under the terms of the plan at issue, the COLA was promised for only a limited period of time. *Id.* at *4. The court explained that the "purpose underlying ERISA's protection of accrued benefits is protection of employee expectations." *Id.* Because the plan stated that "[n]o COLAs were to be provided beyond" the limited period set forth in the plan, the COLA was "not an accrued benefit under ERISA" and its elimination did not violate the anti-cutback rule. *Id.*

The Seventh Circuit's conclusion in the decision below that, if provided to any participant, a COLA is *always* part of every participant's "accrued benefit"—regardless of the terms of the plan—is directly at odds with the holdings of the Fourth and Ninth Circuits that a COLA cannot be categorically treated as an accrued benefit because "the statutory definition" of the term is merely "a signpost directing [courts] to look to the terms of the plan at issue." *Sheet Metal Workers*, 318 F.3d at 602-03; *see also San Diego AFL-CIO*, 1994 WL 198663, at *4. Unlike the Fourth and Ninth Circuits, which look to the language of a particular plan to determine on a case-by-case basis whether a COLA is part of a participant's "accrued benefit," the Seventh Circuit held that the "term 'accrued benefit' has a statutory meaning" that always encompasses a COLA and that "the parties cannot change" by varying the plan's language. Pet. App. 6a (internal quotation marks omitted).[4]

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[4] The Seventh Circuit asserted that *Sheet Metal Workers* is distinguishable because the case pertained to plan participants who had retired before the COLA was added to the plan. Pet. App. 7a. That observation does not alter the fact that the

Accordingly, if respondent had brought this suit in the Fourth or Ninth Circuits, those courts would have looked to the definition of "accrued benefit" under the terms of the Plan to determine whether the COLA provided to participants who select monthly annuity payments is a component of their "accrued benefit" and therefore must be provided to all participants. Because the Plan unambiguously excludes the COLA from its definition of "accrued benefit" (*see supra* pg. 6), those courts would have concluded that the COLA is not part of the participants' "accrued benefit" and need not be paid to participants who select a one-time lump-sum distribution of their benefits.

The conflicting interpretative approaches adopted by the Fourth and Ninth Circuits, on the one hand, and the Seventh Circuit, on the other, vastly complicate the task of employees attempting to plan for retirement and actuaries seeking to ensure that a pension plan is adequately funded to cover its liabilities. Indeed, "[o]ne of the principal goals of ERISA is to enable employers to establish a uniform adminis-

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Fourth Circuit reached the conclusion that the COLA was not a component of the "accrued benefit" of those participants who had retired before its implementation by "look[ing] to the terms of the plan at issue" and determining that the plan did not include a COLA in its definition of "accrued benefit." *Sheet Metal Workers*, 318 F.3d at 602-03. The Seventh Circuit, in contrast, expressly declined to "look to the terms of the plan" when deciding whether the COLA was a component of respondent's "accrued benefit" and instead applied a *per se* rule that any COLA offered to a monthly annuitant is a part of the "accrued benefit" of every plan participant.

trative scheme, which provides a set of standard procedures to guide . . . disbursement of benefits." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (internal quotation marks omitted). Such "[u]niformity is impossible, however, if plans are subject to different legal obligations in different States." *Id.* This Court's review is therefore warranted to provide much-needed clarity to employees, plan actuaries, and lower courts confronted with these irreconcilable interpretations of one of ERISA's most fundamental concepts.

B. The conflict between the Seventh Circuit's *per se* approach to determining whether a COLA is part of a participant's "accrued benefit" and the case-by-case examination undertaken by the Fourth and Ninth Circuits is part of a larger division among the circuits as to whether the terms of a plan are controlling when defining a participant's "accrued benefit."

In *Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516 (3d Cir. 1988), for example, the Third Circuit relied on a plan's terms to conclude that an early retirement benefit provided by the plan was a "retirement-type subsidy"—an amount in excess of "the actuarial equivalent of the normal retirement benefit"—rather than a component of the participants' accrued benefit. *Id.* at 1521 n.6, 1527. The court explained that "an employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive *under the terms of the plan* if employment ceased at that particular point in time" and that, under "the terms of the plan" at issue, the early retirement benefit was an amount in addition to—and separate from—the participants' accrued benefit. *Id.* at 1524 (emphasis added). The plaintiffs were therefore not entitled to receive that early retirement

benefit upon partial termination of the plan. *Id.* at 1528; *see also Hein v. FDIC*, 88 F.3d 210, 218 (3d Cir. 1996) ("we cannot read ERISA to change the terms of the Plan and vest [a participant] with a benefit for which he never qualified").

Moreover, in *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989), the Fourth Circuit held that it is permissible for the terms of an ERISA plan to provide participants who select monthly annuity payments with enhanced benefits—above and beyond their accrued benefit—that need not be provided to recipients who elect a lump-sum distribution. *Id.* at 1195. The plan in question offered several distribution options for individuals receiving early retirement benefits, including a lump-sum distribution and two different monthly annuity options, and calculated the actuarial equivalent of the normal retirement benefit differently for each option. *Id.* at 1183. The court rejected the claim advanced by a group of lump-sum recipients that ERISA entitled them to the higher rates of distribution used to calculate the monthly annuity payments. *Id.* at 1194-95. The court explained that the lower rate of distribution for the lump-sum payment was the actuarial equivalent of the normal retirement benefit and that participants who selected the monthly annuity options were receiving benefits in excess of their normal retirement benefit. *Id.* at 1193-94. "[U]nder the express terms of the Plan," lump-sum recipients were not entitled to this enhancement, and the court

"decline[d] to read into its provisions any such manifestly unintended rule." *Id.* at 1194.[5]

Similarly, in *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), the Ninth Circuit held that a "living pension" feature, which provided for the level of benefits to increase in conjunction with the salary of a participant's former job, was an accrued benefit that could not be decreased by the plan because it "primarily provide[d] retirement income." *Id.* at 1463. The court looked to the terms of the plan in reaching this conclusion, explaining that "the material available for interpreting ERISA's definition of 'accrual' always refers to the terms of the pension plan itself. It is those terms that raise the 'antici-

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[5] The Fourth Circuit's understanding that a lump-sum payment need not be actuarially identical to monthly payments in all situations is entirely consistent with IRS regulations. Indeed, the IRS has promulgated regulations mandating certain disclosures as to the various distribution options provided by a plan so that retirees can easily compare the value of those options. In the preamble to the regulations, the IRS specifically noted that a chief concern was disclosure to participants who must choose between "subsidized annuity distributions" and "unsubsidized single-sum distributions," because participants may be unaware of "the value of the subsidy that is foregone if the single-sum distribution is elected." TD Release No. 9256, *Revised Regulations Concerning Disclosure of Relative Values of Options Forms of Benefit*, 71 Fed. Reg. 14,798, 14,799 (Mar. 24, 2006). This regulation explicitly recognizes that the value of the benefits that a participant receives may be less if selecting a lump-sum payment than if selecting a monthly annuity. Thus, the Seventh Circuit's decision—which expressly rejects this possibility—is inconsistent not only with the Fourth Circuit's decision in *De Nobel*, but also with current Treasury Department regulations.

pat[ion of] retirement benefits' that Congress sought to protect and the 'promised . . . defined pension benefit' that the Supreme Court has sought to protect." *Id.* at 1465-66 (alterations in original).

The Seventh Circuit's conclusion that any benefit paid to a monthly annuitant is necessarily a component of every participant's accrued benefit—regardless of the terms of the plan itself—cannot be reconciled with these decisions in which the Third, Fourth, and Ninth Circuits have looked to the plan language to determine the scope of a participant's accrued benefit and authorized plans to provide monthly annuitants with benefit enhancements not made available to lump-sum recipients. *But see Esden v. Bank of Boston*, 229 F.3d 154, 172 (2d Cir. 2000) ("ERISA was enacted to restrict employers' and employees' freedom of contract when bargaining over pensions. Employers do not have to provide pension plans, but when they do, those plans must comply with Title I of ERISA.") (footnote omitted). This Court's review is required to resolve the conflict between these fundamentally inconsistent approaches to defining a plan participant's "accrued benefit" and "to ensure"—as Congress intended when it enacted ERISA—"that plans and plan sponsors [are] . . . subject to a uniform body of benefits law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (internal quotation marks omitted).

II. THE SEVENTH CIRCUIT'S *PER SE* APPROACH TO DEFINING "ACCRUED BENEFIT" IS INCONSISTENT WITH ERISA'S PLAIN LANGUAGE AND LEGISLATIVE OBJECTIVES.

The Seventh Circuit's conclusion that a COLA is always a component of a plan participant's accrued benefit—even if explicitly excluded from the definition of "accrued benefit" by the terms of the plan—is squarely at odds with the plain language of ERISA and Congress's intentions when enacting the statute.

ERISA does not require employers to establish pension benefit plans or to provide any specific level of benefits when such plans have been established. *Spink*, 517 U.S. at 887. It is therefore "private parties, not the Government, [who] control the level of benefits" provided by a pension plan through their control over the terms of the plan. *Alessi*, 451 U.S. at 511. ERISA simply safeguards participants' expectations by ensuring that they actually receive the benefits promised to them under a plan's terms. *Heinz*, 541 U.S. at 743.

Consistent with the congressional objectives that animate the statute, ERISA explicitly provides that a participant's accrued benefit is to be "determined under the plan" itself (29 U.S.C. § 1002(23)(A)), rather than pursuant to a statutorily prescribed formula. It is undisputed that the terms of the Rohm and Haas Pension Plan exclude the COLA from the definition of a participant's "accrued benefit." Pet. App. 4a; *see also id.* at 69a ("The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan . . . ."). The Seventh Circuit's conclusion that the COLA nevertheless constitutes part of every participant's "accrued benefit" therefore contradicts the plain statutory language of ERISA—

which directs courts to look to the plan's terms when defining a participant's "accrued benefit"—and is flatly inconsistent with ERISA's objective of "protecting employees' *justified* expectations of receiving the benefits their employers promise them." *Heinz*, 541 U.S. at 743 (emphasis added); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) ("the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue").

Indeed, the decision below rests on a fundamental misconception of the protections afforded by ERISA. Participants in the Plan who elected to receive their benefits in a single lump-sum distribution could not have reasonably expected to receive a COLA because the terms of the Plan expressly and repeatedly provide that a COLA is available *only* to participants who elect monthly annuity payments. *See, e.g.*, Pet. App. 59a. ERISA's objective of ensuring that plan participants receive the benefits promised to them under the terms of the plan therefore militates in favor of restricting payment of the COLA to participants who receive monthly annuity payments and denying a windfall COLA payment to lump-sum recipients. The Seventh Circuit's decision to unilaterally rewrite the Plan's terms improperly substitutes its own judgment for that of the Plan's drafters and compels defined benefit pension plans to shift a portion of their finite resources from paying annuitants their expected benefits to funding an unexpected and unwarranted COLA for lump-sum recipients. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) ("employers have large leeway to design disability and other welfare plans as they see fit").

The decision below similarly reflects a basic misreading of the statutory definition of "accrued benefit." ERISA specifies both how an accrued benefit is to be determined and how it is to be expressed. It is "*determined* under the plan" and it is "*expressed* in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A) (emphases added). The decision below eviscerates the first clause of the statutory definition by holding that any benefit that would be paid as part of a retiree's "annual benefit" is necessarily part of the "accrued benefit," even if expressly excluded from the definition of "accrued benefit" by the terms of the plan. Indeed, the decision on which the Seventh Circuit principally relied, *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Union*, 980 F.2d 465 (7th Cir. 1992), explicitly read the "determined under the plan language" out of the statutory definition, suggesting that an "accrued benefit is, 'in the case of a defined benefit plan, . . . an annual benefit commencing at normal retirement age.'" *Id.* at 468 (quoting 29 U.S.C. § 1002(23)(A)) (alteration in original). The Seventh Circuit perpetuated this erroneous statutory construction in the decision below.[6]

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[6] The Seventh Circuit also disregarded the fact that it is a condition precedent to the possibility of any COLA that the participant be a retiree who has already selected the monthly annuity. Because the COLA must follow the selection of the monthly annuity and is not paid until "March 31st subsequent to the year of retirement" (Pet. App. 59a), it cannot be part of the annuity "commencing at normal retirement age" and thus cannot be part of the "accrued benefit" under ERISA. 29 U.S.C. § 1002(23)(A). This conclusion is reinforced by the fact that, under the terms of the Plan, payment of the COLA may in some

Properly conceived, the Plan's COLA is a "retirement-type subsidy" paid to monthly annuitants—an amount in excess of "the actuarial equivalent of [their] normal retirement benefit" (*Ashenbaugh*, 854 F.2d at 1521 n.6)—rather than a component of a participant's accrued benefit, and it therefore need not be paid to participants who receive a lump-sum distribution of their benefits. *See* 29 U.S.C. § 1054(g)(1)-(2) (distinguishing between an accrued benefit and a retirement-type subsidy). Participants who select monthly annuity payments receive both their normal retirement benefit (a monthly payment calculated based on years of service and compensation) *and* the COLA, which is defined under the Plan as a benefit enhancement that is distinct from a participant's normal retirement benefit and that is paid at the discretion of the Plan. Pet. App. 59a, 69a. A participant who elects a lump-sum distribution, in contrast, receives the full "actuarial equivalent of the normal retirement benefit" paid to monthly annuitants, but is not entitled to the COLA because it is a separate and additional amount limited to a specific class of beneficiaries under the terms of the Plan.

This Court's review is warranted to correct the Seventh Circuit's erroneous interpretation of ERISA and to ensure that "private parties," not courts, have

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[Footnote continued from previous page]

cases commence *before* a participant reaches normal retirement age. Pet. App. 61a; *see also Am. Stores Co. v. Am. Stores Co. Retirement Plan*, 928 F.2d 986, 990 (10th Cir. 1991) (holding that unreduced early retirement benefits were not accrued benefits because they did not commence at normal retirement age).

the final word regarding "the level of benefits" provided by a plan. *Alessi*, 451 U.S. at 511.

III. The Decision Below Vastly Increases The Risk Of Plan Underfunding And Termination.

The Seventh Circuit's holding that a COLA is *per se* a component of the "accrued benefit" under a defined benefit pension plan—even when expressly excluded from the plan's definition of "accrued benefit"—upsets the settled funding expectations of plan sponsors and exposes plans to new and unforeseen liabilities that many plans (and their sponsors) may be unable to absorb. The inevitable result will be an intensification of the current pension crisis through widespread plan underfunding and potential plan terminations.

The conclusion that a plan feature constitutes an "accrued benefit" has significant financial implications for a plan. Not only must an accrued benefit be provided in an actuarially equivalent amount to participants who select a lump-sum distribution of benefits (29 U.S.C. § 1054(c)(3)), but plans are also prohibited by the anti-cutback rule from reducing the amount of an accrued benefit. *Id.* § 1054(g). Thus, when a court holds, as the Seventh Circuit did below, that a plan feature excluded from a plan's definition of "accrued benefit" nevertheless constitutes part of that benefit, the plan is required to provide that benefit to participants who elect lump-sum payments—even though they never expected to receive such a benefit—and is thereafter prohibited from reducing the amount of that benefit—whether or not the plan has adequate funds to finance this additional obligation. Many plans may be unable to sustain the imposition of such unexpected liability.

In the specific case of COLAs, for example, many plans funded on the actuarial assumption that the COLA they provide to monthly annuitants did not constitute part of the participants' accrued benefit may be unable to finance the cost of providing this additional benefit to lump-sum recipients. For those defined benefit pension plans that are already struggling—due to historically low interest rates, poor returns on investment, and other factors—to meet their financial obligations to participants, the requirement to begin providing a COLA to lump-sum recipients whenever they provide a COLA to monthly annuitants will move them one step closer to insolvency and potential termination. Such a result is directly at odds with ERISA's objective of "discourag[ing] plan terminations." *Nachman Corp.*, 446 U.S. at 382. At a minimum, plans will be less likely to provide *any* of their new participants with a COLA in order to avoid the obligation to pay the COLA to lump-sum recipients—to the substantial detriment of monthly annuitants, who may experience a significant diminution in the value of their benefits over time due to inflation.

The Nation's pension system is already widely acknowledged to be in a state of crisis. *See, e.g.*, Comm. on Educ. & Workforce, U.S. House of Representatives, Nation's Editorial Pages Highlight Pension Crisis (Dec. 1, 2005). Funding shortfalls have forced numerous companies—including IBM, Verizon, and Hewlett-Packard—to freeze benefits or terminate their plans altogether. *See, e.g.*, Ellen E. Schultz et al., *Tracking the Numbers / Outside Audit: Forecast: More Pension Freezes*, Wall St. J., Jan. 12, 2006, at C1. Indeed, the Pension Benefit Guaranty Corporation ("PBGC")—which "protect[s] employees against the loss of 'nonforfeitable' benefits upon ter-

mination of pension plans that lack sufficient funds" (*Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 7 (2004) (internal quotation marks omitted))—reported that in 2005, "1,108 plans covering 15 million workers and retirees had $787 billion in assets to cover over $1.14 trillion in liabilities, for an average funded ratio of 69 percent." Testimony of Bradley D. Belt, Executive Dir. PBGC, Before the Comm. on Budget, United States Senate, *at* http://www.pbgc.gov/media/news-archive/testimony/tm13070.html (last accessed Jan. 7, 2008). The rapid increase in plan terminations over the past few years left the PBGC with a multibillion-dollar deficit—even though it guarantees only a portion of a plan participant's benefits—and compelled Congress in 2006 to enact legislation to shore up the remaining defined benefit plans and avert an even more serious pension crisis. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780; *see also* Alison Grant, *Pension Safety Net Is Getting Tattered; Federal Agency Could Run Out of Money as Bankruptcies Mount*, Plain Dealer (Cleveland), July 2, 2006, at A1.

The Seventh Circuit's conclusion that, regardless of a plan's terms, COLAs and analogous benefit enhancements provided to only a subset of plan participants *always* constitute part of a participant's accrued benefit will exacerbate this chronic state of underfunding and accelerate the alarming rate of plan termination. This Court's review is warranted to ensure that—consistent with the statutory objectives of ERISA and the interests of millions of retirees dependent on their pension benefits—courts do not unilaterally rewrite the terms of defined benefit pension plans and require those plans to assume unforeseen pension obligations that participants never

expected to receive and that many plans may be unable to absorb.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 8, 2008

APPENDIX

APPENDIX A

Gary WILLIAMS, Plaintiff–Appellee,

v.

ROHM AND HAAS PENSION PLAN, Defendant–Appellant.

No. 06–2555.

United States Court of Appeals, Seventh Circuit.

Argued June 6, 2007.

Decided Aug. 14, 2007.

Rehearing and Rehearing En Banc Denied Oct. 10, 2007.*

James T. Malysiak, Lee A. Freeman, Jr. (argued), Jenner & Block, Chicago, IL, for Defendant–Appellant.

Linda M. Doyle, McDermott, Will & Emery, Chicago, IL, M. Miller Baker (argued), McDermott, Will & Emery, Washington, DC, for Plaintiff–Appellee.

Before RIPPLE, KANNE, and EVANS, Circuit Judges.

KANNE, Circuit Judge.

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* Judges Flaum and Rovner took no part in the consideration of this case.

Gary Williams filed suit, individually and on behalf of all others similarly situated, alleging that the Rohm and Haas Pension Plan (Plan) violated the Employee Retirement Income Security Act (ERISA) by failing to include a cost-of-living adjustment (COLA) in his lump sum distribution from the Plan. 29 U.S.C. § 1054(c)(3). The district court granted class certification and entered summary judgment for Williams. The district court concluded that the terms of the Plan violated ERISA because the COLA was an accrued benefit as ERISA defines that term. We agree, and therefore affirm the judgment of the district court.

I. BACKGROUND

The Plan is a defined benefit pension plan under § 3(35) of ERISA. 29 U.S.C. § 1002(35). Section 3.1 of the Plan defines "Accrued Benefit" as "that portion of a Participant's Basic Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date, that has accrued as of any determination date in accordance with Article VII." Article VII provides a formula to calculate the "Normal Retirement Pension" as a function of the participant's years of service and level of compensation. The accrued benefit, under the terms of the Plan, is thus the result of this formula, expressed in terms of a monthly single life annuity.

The Plan provides participants with a variety of payment options, as relevant here, either a one-time lump sum distribution or a monthly annuity payment. The Plan explains that the lump sum distribution is the actuarial equivalent of the accrued benefit, calculated using interest rates and mortality tables set by the Internal Revenue Code.

COLAs are commonly applied to annuities in order to account for inflation. With a COLA, an annuitant's payments will increase each year at a level commensurate with the calculated rate. The Plan calculates each year's COLA based upon the previous year's Consumer Price Index for Urban Wage Earners and Clerical Workers and limits each Participant's COLA to three percent of their annual benefit. The Plan describes the COLA as an "enhancement." While participants who choose to receive their pension payments as an annuity are automatically entitled to a COLA, those who choose a one-time lump sum payment do not qualify for the COLA enhancement.

Williams was employed by Rohm and Haas from 1969 until his termination in 1997. As a participant in the Plan, he was entitled to his accrued benefit under the Plan upon his termination. Williams chose to receive his pension in a one-time lump sum distribution of $47,850.71. Six years later, Williams filed a class action suit against Rohm and Haas alleging that he was wrongfully denied benefits under the Plan because his lump sum distribution did not include the present value of the COLA he would have received had he chosen to receive his pension in the form of monthly annuity payments. The district court dismissed the complaint because Williams had not exhausted his administrative remedies. Williams exhausted the administrative process, to no avail, and filed the instant case in 2004.

After granting class certification for former Plan participants who had received lump sum distributions without COLAs, the district court denied the Plan's motion for summary judgment and granted Williams's motion for summary judgment.

II. ANALYSIS

The issue before us is whether the Plan's COLA falls within ERISA's definition of "accrued benefit." If so, then the Plan violates ERISA by providing COLAs to participants who opt for annuity payments but denying COLAs to participants who opt for one-time lump sum distributions. 29 U.S.C. § 1054(c)(3). We review the district court's grant of summary judgment *de novo*, viewing all facts in the light most favorable to the non-moving party. *Sperandeo v. Lorillard Tobacco Co., Inc.*, 460 F.3d 866, 870 (7th Cir. 2006) (citing *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 631 (7th Cir. 2004)); *see also Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 357 (7th Cir. 2006) (noting that, notwithstanding discretion afforded a plan administrator, claims that the plan as interpreted violates ERISA are reviewed *de novo*). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

The parties agree that the plain terms of the Plan exclude the COLA from a participant's accrued benefit. Therefore, we need only decide whether this formulation complies with ERISA's requirements. ERISA and the Internal Revenue Code prescribe that if a defined benefit pension plan allows for a lump sum distribution, then that distribution must equal the present value of the accrued benefit expressed in the form of a single-life annuity. 29 U.S.C. § 1054(c)(3); 26 U.S.C. § 411(c)(3); 26 C.F.R. § 1.417(e)–1(d). We recognized this limitation in *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, where we stated: "ERISA requires that any lump-sum substitute for an accrued pension benefit be the

actuarial equivalent of that benefit." 338 F.3d 755, 759 (7th Cir. 2003) (citing 29 U.S.C. § 1054(c)(3); *May Dept. Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 600 (7th Cir. 2002); *Esden v. Bank of Boston*, 229 F.3d 154, 164, 173 (2d Cir. 2000)); *see also Call v. Ameritech Mgmt. Pension Plan*, 475 F.3d 816, 817 (7th Cir. 2007) ("When a participant in a defined-benefit pension plan is given a choice between taking pension benefits as an annuity or in a lump sum, the lump sum must be so calculated as to be the actuarial equivalent of the annuity.").

So, what is an "accrued benefit" under ERISA? The Plan urges us to interpret "accrued benefit" to mean whatever the particular plan document says it means. Indeed, it finds support for this interpretation in ERISA § 2(23)(A): "The term 'accrued benefit' means—. . . the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). ERISA itself directs us to look at the individual plan's terms in order to discern the accrued benefit. *See Bd. of Trs. of Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599, 602–03 (4th Cir. 2003). Under ERISA, "private parties, not the Government, control the level of benefits" provided to pension plan participants. *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 511, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

Williams acknowledges that we must look to the individual plan document to determine what the "accrued benefit" is in any given case, but argues that ERISA does not accept the document's definition. Rather, the "accrued benefit" is that benefit a participant would be entitled to if he chose to receive it in the form of a single-life annuity, thus, forcing par-

ity between annuity and lump sum distributions. In this case, the Plan considers the COLA to be an enhancement that is awarded to annuitants, over and above the accrued benefit. Under Williams's interpretation of ERISA, we simply ask: What would Williams get if he chose to receive his pension in annuity payments? The annuity, calculated based upon his years of service and compensation, plus the yearly COLA. That is the accrued benefit. Williams's lump-sum payment would then be the combined present value of the annuity and projected COLA.

We considered a very similar issue in *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992). In *Hickey*, a plan terminated without providing funding for future COLAs. We held that the COLA was part of the accrued benefit and, as such, its elimination violated ERISA's anti-cutback provision. *Id.* at 470; *see* 29 U.S.C. § 1054(g)(1). In reaching our decision, we distinguished accrued benefits from ancillary benefits. *Id.* at 468 (citing H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5054). Ancillary benefits are those that would be provided by a new employer, separate from any benefits provided by the current employer, such as health or life insurance. *Id.* (citing H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726). "In contrast, the COLA [is] inseparably tied to the monthly retirement benefit as a means for maintaining the real value of that benefit. It [cannot], therefore, be said to be ancillary to the benefit, and it would not be provided by a new employer." *Id.*

Accordingly, we stated that "[t]he term 'accrued benefit' has a statutory meaning, and the parties cannot change that meaning by simply labeling cer-

tain benefits as 'accrued benefits' and others, such as the COLA, as 'supplementary benefits.'" *Id.* at 468. But this is precisely what the Plan has attempted to do in this case. It seeks to disguise a penalty exacted against lump sum recipients as a bonus afforded to annuitants. In fact, it appears that the Plan attempted to write around ERISA's limits by explicitly excluding the COLA from lump sum distributions after learning of a district court case holding that a COLA is, *per se*, an accrued benefit under ERISA. *See Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189 (D. Mass. 2001).

The Plan argues that the district court's decision penalizes it for providing an enhanced benefit to annuitants, and that such a penalty is contrary to the purposes of ERISA. In support of this argument, the Plan relies primarily on the Fourth Circuit's opinion in *Sheet Metal Workers*, quoting: "[I]f trustees of ERISA plans knew that providing an additional benefit to already-retired employees for a given year would lock that benefit in as a floor for all future years, they would be less likely to increase benefits gratuitously in years when the plans were particularly flush." Appellant's Br. p. 24 (quoting 318 F.3d at 605). The key to the quoted passage is that the participants were "already retired." The COLA in that case was in no way "accrued" because it was not included in the plan during the term of the participants' employment. *Sheet Metal Workers*, 318 F.3d at 601. Employers are not required to provide pension benefits, but when they do, their plans must comply with ERISA, and the promises they make can in no way be considered mere gratuities. *See May Dept's Stores Co.*, 305 F.3d at 601.

The Plan cannot avoid that which is dictated by the terms of ERISA. While ERISA generally allows each plan to select the monetary amount of benefits provided, it remains a paternalistic regulation designed to restrict the freedom of contract. *Id. Hickey* held that a COLA applied to a defined benefit pension plan annuity is an accrued benefit under ERISA, and that holding is determinative in this case. The Plan, as administered, violates ERISA. 29 U.S.C. § 1054(c)(3). If a defined benefit pension plan entitles an annuitant to a COLA, it must also provide the COLA's actuarial equivalent to a participant who chooses instead to receive his pension in the form of a one-time lump sum distribution.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED; and this case is REMANDED to the district court for further proceedings, including calculating the value of the COLAs that were denied.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GARY WILLIAMS, Individually and on behalf of all others similarly situated, Plaintiffs,	)	
vs.	)	4:04-CV-0078-SEB-WGH
ROHM AND HAAS PENSION PLAN, Defendant.	)	

ENTRY DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Gary Williams ("Williams") filed suit, on behalf of himself and a class of similarly situated individuals (the "Class" or "Plaintiffs"), contending that the

Rohm and Haas Pension Plan[1] (the "Plan" or "Defendant") violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 et seq., by failing to include the value of a cost-of-living adjustment ("COLA") in his lump sum distribution from the Plan.[2]

This matter comes before the Court on the Plan's and Williams's cross motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.[3] For the reasons outlined below, we DENY Defendant's Motion for Summary Judgment

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[1] As a result of the merger of the Morton International, Inc. Pension Plan with and into the Rohm and Haas Pension Plan and the addition of a new benefit formula, the Rohm and Haas Pension Plan was amended and renamed effective April 1, 2001, as the Rohm and Haas Company Retirement Plan. Def. Mem. for Summ. J. at 4. The governing Plan document in effect at the time of Williams's distribution from the Plan in 1997, was referred to in Patricia Coyle's deposition as the "Legacy Plan," which was the Rohm and Haas Pension Plan, as amended and restated effective December 31, 1994. (AR00022-00110).

[2] On October 22, 2004, the Court certified a class of plaintiffs in these terms:

> "All former participants in the Rohm & Haas Pension Plan (the "Plan") who received a lump sum distribution from the Plan which did not take into account a cost of living adjustment in calculating the lump sum distribution."

Gary Williams was appointed Class Representative and his attorneys as class counsel.

[3] Williams filed his memo in support of summary judgment on behalf of the class on June 15, 2005; Defendant filed its motion for summary judgment also on June 15, 2005.

and GRANT Plaintiffs' Motion for Summary Judgment.

Introduction

A. *Summary of Defendant's Motion for Summary Judgment*

Defendant contends that both of the ERISA remedial provisions under which Williams's one-count complaint arises—Sections 502(a)(1)(B) and 502(a)(3)—suffer from procedural and substantive flaws, which bar Plaintiffs from securing relief under either of them. Def. Memo for S.J. at 1. First, Defendant claims that Williams's ERISA Section 502(a)(1)(B) claim must be reviewed under the deferential arbitrary and capricious standard. Under this standard, Defendant argues that the Rohm and Haas Benefits Administrative Committee's (the "BAC") decision to deny Williams's benefit claim must be upheld because it was reasonable based on the Plan's unambiguous terms. Second, Defendant contends that Williams's claim for equitable relief under Section 502(a)(3) should be dismissed for at least two reasons: (1) Williams cannot recover under Section 502(a)(3) because he has pled a claim for relief under Section 502(a)(1)(B) through which he seeks the same relief; and (2) Williams does not seek "other appropriate equitable relief" under ERISA because the benefits he seeks in his complaint constitutes an award of monetary damages.

B. *Summary of Plaintiffs' Motion for Summary Judgment*

Williams seeks summary judgment in favor of himself and the Class because: (1) the Plan included an automatic cost-of-living-adjustment ("COLA") as part of each participant's normal retirement benefit;

(2) the COLA is an "accrued benefit," as defined by ERISA § 3(23), 29 U.S.C. § 1002(23), and Internal Revenue Code § 411(a)(7), 26 U.S.C. § 411(a)(7); (3) the Plan failed to specify the value of the COLA in the Class members' lump-sum distributions; and (4) as a result, the Class members unintentionally forfeited a portion of their accrued benefit and received less than the full present value of their benefit, in violation of ERISA and the implementing Treasury Regulations.

FACTUAL BACKGROUND

A. Rohm and Haas Pension Plan

The Plan is a defined benefit pension plan within the meaning of Section 3(35) of ERISA, 29 U.S.C. § 1002(35). The Plan is sponsored by Rohm and Haas and was originally adopted to provide pension benefits for eligible employees of Rohm and Haas and its Affiliates in order to supplement retirement income benefits provided under the Social Security Act. (Complaint ¶ 2; AR 00159).[4] The Plan has at all times maintained its tax qualified status under the Internal Revenue Code. (AR00160).

Under the Plan, the Benefits Administrative Committee ("BAC") is the Plan Administrator as that term is defined under ERISA. See 29 U.S.C. § 1002(16)(A). The BAC has full responsibility to represent Participating Employers and Participants

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[4] References to "AR[No.]" are to the Administrative Record utilized to evaluate Williams's claim appeal for benefits under the Plan, Bates-stamped Nos. AR001-0337. The Administrative Record was authenticated by Patricia Coyle in her January 26, 2005 deposition.

in all things it may deem necessary for the Plan's proper administration, and, subject to the Plan's terms, the BAC's interpretation and administration of the Plan is conclusive. (AR00204). Under Section 15.3 of the Plan, the BAC's responsibilities include (but are not limited to): (i) verifying all procedures by which payments to Participants and Beneficiaries are authorized; (ii) interpreting Plan provisions in all particulars; and (iii) reviewing and answering any denied claim for benefits that has been appealed to the BAC under the Plan's claims procedures. (AR00204-205).

Under the Plan's claims procedures, in the case of an adverse benefit determination, the claimant or his representative has the opportunity to appeal a denied benefit claim to the BAC for review by requesting such review in writing within sixty days of receipt of notification of the denial. In reviewing a claim appeal, the BAC considers all comments, documents, records, and other information submitted by the claimant or his representative relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination. (AR00206-207, 228-229). The BAC reviews the claim appeal, the claim appeal summary, and other documents and information relevant to the claim, and votes to approve or deny the claim. The BAC members' votes are then sent to the BAC's Secretary to be tallied, and a formal claim appeal response is prepared by the BAC's Secretary for transmittal to the claimant. (Coyle Dep. at 16-17).

B. Plan's Definition of "Accrued Benefit" and "Normal Retirement Pension"

Section 3.1 of the Plan defines "Accrued Benefit" to mean "that portion of a Participant's Basic

Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date, that has accrued as of any determination date in accordance with Article VII." (AR00033).

Under Article VII, a Participant's "Normal Retirement Pension" is calculated pursuant to a set formula, which multiplies a specific dollar amount (either a percentage of the Participant's compensation or a set dollar amount) by the Participant's years of Benefit Service accumulated at the time of retirement, subject to certain limitations. The Participant's Accrued Benefit is then expressed to the Participant in terms of a monthly single life annuity as of the Participant's retirement date under Article VII. (AR00052-57).

The Plan provides that a Participant may have his or her Normal Retirement Pension distributed in a variety of payment forms, from monthly annuity payments to a one-time lump sum payment at the time of retirement. (AR00063-70). Article X of the Plan requires the BAC to furnish each Participant or terminated Participant with a general description of all payment options available, including a general explanation of the relative financial effect on a Participant's benefits of any of the available distribution forms. This description typically includes the amounts available under each option, which would be actuarially equivalent to the Participant's Accrued Benefit determined at the time of his retirement. (AR00063-64). Under Section 12.1.4 of the Plan, a Participant may elect to receive a one-time lump sum distribution of the Actuarial Equivalent present value of his Accrued Benefit, as determined under Appendix D to the Plan. (AR00068).

The Plan defines "Actuarial Equivalent" to mean "a benefit of equivalent actuarial value to the benefit that would otherwise have been provided to the Employee, determined on the basis of appropriate actuarial assumptions and methods set forth in Appendices A through D attached hereto." (AR00033). For purposes of determining the Actuarial Equivalent lump sum present value of a Participant's Normal Retirement Pension, Appendix D to the Plan sets forth the actuarial assumptions, which are limited to applicable interest rates and mortality tables to be used to determine the present value of a Participant's Normal Retirement Pension under the Plan, which are set by the Internal Revenue Code. COLA adjustments are not mentioned or specifically provided for in Appendix D to the Plan. (AR00105-107).

C. Plan's Provisions Do Not Allow for COLAs on Lump Sum Distributions

Article XV of the Plan sets forth the rules governing the payment of a COLA enhancement to a Participant. Specifically, Section 15.1 of the Plan states that a COLA enhancement may be paid only to Participants receiving monthly benefit payments—not to Participants who elect to receive a lump sum payout: "Except as provided in Sections 15.3 and 15.4, beginning with pension payments in March, 1974 . . . any Participant or Beneficiary of an eligible Participant (or a Participant who would have been eligible except for age), who is receiving monthly payments, shall be entitled to an annual Cost-of-Living Adjustment as described below. . . ." (AR00078; emphasis supplied).

Section 12.5 of the Plan also references the application of COLA enhancements, providing that "the Cost-of-Living Adjustment to pensions described in

Article XV, shall apply only to the monthly payments to" a contingent annuitant or Beneficiary who survives a retired Participant. (AR00070).

The Plan's summary plan description ("SPD") states:

> *What is a "COLA" and am I eligible to receive it?*
>
> The cost of living adjustment or "COLA" is an annual adjustment to monthly payments from the Plan intended to keep pace with inflation. The amount of the annual increase is based on the increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the previous year but is limited to no more than 3% of your annual benefit in any year. (AR00290).
>
> The COLA only applies to monthly payments; it does NOT apply if you receive your benefit in the form of a cash lump sum. The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law. The Plan may, at its discretion, eliminate the COLA at any time, regardless of whether it has made COLA payments in the past. (AR00290, emphasis added).

D. The BAC Denied Williams's Claim Appeal for Benefits Under the Plan

Williams was employed by Rohm and Haas from December 1, 1969 through March 31, 1997, when his employment was terminated for violating Rohm and Haas' Harassment Prevention and Correction Policy. (AR00004, 49). On March 31, 1997, Williams elected to receive his Normal Retirement Pension under the

Plan in the form of a one-time lump sum payment under Plan Section 12.1.4. Williams received as a lump sum payment—$47,850.71—his Accrued Benefit under the Plan on May 30, 1997. (AR00001). Six years thereafter, or about March 2003, Williams filed this class action complaint alleging that he was wrongfully denied benefits under the Plan because his lump sum payment did not include the value of the COLA he would have received had he elected to receive his benefits monthly under an annuity distribution option. (AR00018). On September 26, 2003, we granted the Plan's motion to dismiss Williams's class action complaint because Williams had failed to exhaust his available administrative remedies under the Plan. (*Williams v. Rohm and Haas Pension Plan*, No. NA-02-C-123, 2003 U.S. Dist. LEXIS 17313 (S.D. Ind. Sept. 26, 2003)).

On October 21, 2003, Williams, through his counsel, sent his administrative claim for benefits not to the BAC directly, but to the Plan's litigation counsel, arguing that the COLA enhancement added to monthly payments under the Plan is an accrued benefit and therefore part of his normal retirement benefit under the Plan. Williams claimed that if his lump sum distribution had included the value of the COLA, his distribution amount would have been larger than what he had received, prompting this request that he be paid the additional benefits equal to the value of the COLA. (AR00009-16).

On February 2, 2004, Williams, again through his counsel, submitted a claim appeal in which he incorporated all of the arguments raised and documents submitted in his initial benefits claim. (AR00008). The BAC, through its Secretary Patricia Coyle ("Coyle"), received and processed the claim appeal in the standard fashion, which included her re-

view and research as well as that of others on Rohm and Haas' benefits staff. (Coyle Dep. at 17, 131-133).

On April 1, 2004, Coyle, on the BAC's behalf, sent Williams's counsel a letter, notifying him that Williams's claim appeal had been denied by the BAC. In this letter, Coyle set forth the applicable Plan provisions on which the denial was based and explained the bases for the BAC's decision. (AR000001-2). Williams filed the instant lawsuit on April 2, 2004. (Compl. at 1).

LEGAL ANALYSIS

I. Standard of Review

Benefit determinations in ERISA cases, pursuant to 29 U.S.C. § 1132(a)(1)(B), are reviewed by the court *de novo*, unless the plan administrator has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the plan vests discretionary authority in the plan administrator, the standard of judicial review is based on an "arbitrary and capricious" analysis.[5] *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144,

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[5] The Seventh Circuit has held that the arbitrary and capricious standard is highly deferential to a plan administrator. Under the arbitrary and capricious standard, the BAC's decision to deny Williams's benefits claim appeal should be overturned only if it is "downright unreasonable" and not merely incorrect. *Tegtmeier v. Midwest Operating Engineers Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004). It is not the Court's function to decide whether it would reach the same conclusion as the Plan or even rely on the same authority. *Id.* If the Court determines that the BAC made an informed judgment and articulated an explanation for its decision that is satisfactory in light of the relevant plan's terms, the BAC's decision is

1147 (7th Cir. 1998); *see also Morgan v. Cigna Group Ins.*, 2003 WL 722804, *6 (S.D. Ind. 2003) (Barker, J.). However, the courts do not defer to the plan administrator's interpretation of a federal statute. *See, e.g., McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1108 (9th Cir. 2000). In a case where the claim against the plan is not that the terms of the plan were wrongly decided or construed, but that the plan itself is contrary to ERISA, then the decisions of a plan administrator will be reviewed *de novo*, as those decisions involve pure questions of law and the interpretation of the plan is not in dispute. *See Williams v. Midwest Operating Engineers Welfare Fund*, 125 F.3d 1138, 1140 (7th Cir. 1997).

In this case, the Plaintiffs' claim against the plan is not that the terms of the plan were wrongly decided or construed, but that the plan itself is contrary to ERISA. In his claim appeal, Williams admitted that he was ineligible to receive a COLA under the Plan's terms. See AR00009. Instead, he argues that the Plan's terms violate ERISA and the Internal Revenue Code. See AR00009-15. We review *de novo* the issue of ERISA's legal requirements.[6]

[Footnote continued from previous page]

deemed final and should not be disturbed. *See Exbom v. Cen. States, S.E. & S.W. Areas Health & Welfare Fund*, 900 F.2d 1138, 1143 (7th Cir. 1990). The Court does not ask whether it, a jury or a different plan administrator would have granted the benefits; questions of judgment or choices between competing reasonable outcomes are left to the plan administrator. *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 505 n.3 (7th Cir. 1995).

[6] If the issue were simply whether the Plan's definition of "Accrued Benefit" includes a COLA enhancement then Defendant would be correct that the appropriate standard of review

III. Does ERISA Provide a Remedy through which Plaintiffs May Seek to Recover for the Violation Alleged in the Complaint?

Williams has identified two, separate remedial provisions under which his ERISA claim purportedly arises; (1) under ERISA Section 502(a)(1)(B)–he seeks to recover benefits allegedly wrongfully denied him under the terms of the Plan; and (2) under ERISA, Section 502(a)(3)–he and the Class seek recovery of their Plan benefits through a declaration from the Court that BAC's decision to deny this claim appeal for benefits was wrongfully decided under applicable law. Defendant asserts that Williams's claim suffers from both procedural and substantive flaws, which bar relief under either remedial provision. Def. Memo for S.J. at 1.

A. Williams's Wrongful Denial of Benefits Claim under ERISA Section 502(a)(1)(B)

Section 502(a)(1)(B) permits participants or beneficiaries to bring a civil action: (1) to recover benefits due under the terms of his plan; (2) to enforce rights under the terms of the plan; or (3) to clarify rights to future benefits under the terms of the plan. See 29 U.S.C. § 1132(a)(1)(B). In *May Dept. Stores v. Federal Ins. Co.*, 305 F.3d 597 (7th

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[Footnote continued from previous page]

would involve the deferential arbitrary and capricious standard in our considering whether the BAC's interpretation of the Plan's terms was reasonable. See Def. Response at 7. It is undisputed that the BAC is granted sufficient discretionary authority to determine eligibility for benefits and to construe the terms of the plan.

Cir. 2002) (Posner, J.), the pension plan was sued under ERISA § 502(a)(3) for calculating lump sum distributions as amounts less than the present value of the normal annuity (albeit in accordance with the plan terms). On appeal of a subsequent coverage case between the plan and plan sponsor, and the E&O carrier, the plaintiffs (May and the plan) argued that because the employees' claims against their employers were not based on the language of the plan but provisions of ERISA, the claims were not for "benefits." 305 F.3d at 601. The Seventh Circuit disagreed. Judge Posner explained:

> The benefits sought were plan benefits; the question was how to compute them. The answer was given by ERISA, but that is just to say that, like many other contracts, pension plans governed by ERISA contain provisions implied by law.

Id.

Defendant states that Williams cannot recover under Section 502(a)(1)(B) because: (1) it is undisputed that Williams's claim for increased benefits through inclusion of the COLA enhancement's future value in his lump sum payment is not permitted under the Plan's unambiguous terms; (2) that Williams does not seek to enforce any rights under the Plan's terms—rather, he seeks to recover additional benefits; and (3) that Williams cannot argue that he seeks to clarify his rights to future benefits under the Plan, as he received a lump sum payment of all of his Accrued Benefits under the Plan in 1997. Therefore, Defendant argues, Williams is not entitled to any relief under Section 502(a)(1)(B) by the express terms of that ERISA remedial provision.

The reasoning in *May Dept. Stores v. Federal Ins. Co.*, 305 F.3d 597 (7th Cir. 2002), provides guidance and leads to a conclusion different from that asserted by the Defendant. Following *May*, it can fairly be said that Williams seeks to recover benefits wrongfully denied by the Plan. Here, as in *May*, when determining how the Plan's benefits are to be computed, the answer arises from the terms and provisions of ERISA. The Plan, which is governed by ERISA, incorporates provisions implied by law. So, even if the Plan's unambiguous (and allegedly unlawful) terms prohibit the inclusion of a COLA in a lump sum payment, that requirement may nonetheless be implied by ERISA and entitle Williams to such a benefit. Thus, Williams's effort is to recover "benefits due to him under the terms of his plan," even though those benefits are implied by ERISA, which law governs the Plan and is legally permissible.

B. Williams's Equitable Relief Claim under ERISA Section 502(a)(3)

Williams also brings his claims under Section 502(a)(3) seeking a "declaration" that the Plan violated ERISA. Defendant contends that Williams's claim for equitable relief under Section 502(a)(3) should be dismissed for at least two reasons: (1) Williams cannot recover under Section 502(a)(3) because he has plead a separate claim for relief under Section 502(a)(1)(B) through which he seeks the same relief; and (2) Williams does not seek "other appropriate equitable relief" under ERISA because the benefits he seeks in his complaint in fact constitute a request for monetary damages. Section 502(a)(3) of ERISA provides that:

> a civil action may be brought—by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

See 29 U.S.C. §1132(a)(3).

In *Varity Corp. v. Howe*, 516 U.S. 489 (1996) the Supreme Court of the United States, addressing proper claims under Section 502(a)(3), held that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief would normally not be 'appropriate.'" 516 U.S. at 515. "In short, *Varity* does not force a plaintiff to elect his remedy before filing a complaint, but rather prohibits a plaintiff from receiving equitable relief under ERISA § 502(a)(3) in addition to some other form of relief. *Varity*, 516 U.S. at 515." *Laurenzano*, 134 F. Supp. 2d at 194-195. Thus, Williams is not foreclosed from seeking equitable relief under ERISA Section 502(a)(3), simply because he has also pled a claim for relief under Section 502(a)(1)(B).

A year after *May* was decided, the Seventh Circuit had occasion to examine the interplay between ERISA §§ 502(a)(1)(B) and 502(a)(3) in *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 763 (7th Cir. 2003) (Posner, J.). There, citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Plan argued that the case could not be certified under Federal Rule of Civil Procedure 23(b)(2), because plaintiffs were not seeking injunctive or declaratory relief, "but really just damages

equal to the difference between the lump sums to which ERISA entitled the members of the class and the smaller lump sums they actually received." 338 F.3d at 763. Although plaintiffs cast their case in terms of Section 502(a)(3), Judge Posner cited 502(a)(1)(B) and stated that the suit "is by plan participants suing 'to recover benefits.'" *Berger*, 338 F.3d at 763. The Court wrote:

> What is sought is a declaration that [Defendant's] method of computing lump sums to which withdrawing employees are entitled is unlawful. That is a ground common to all the members of the class. True, the declaration sought and obtained was merely a prelude to a request for damages (incorrectly described by the plaintiffs as a request for restitutionary relief equitable in nature - the monetary relief sought is not restitutionary, and if it were it would not be equitable, *Great West Life & Annuity Ins. Co. v. Knudson*, *supra*, 534 U.S. at 213-14; [citation omitted]). But a declaratory judgment is *normally* a prelude to a request for other relief, whether injunctive or monetary; so there is nothing suspicious about the characterization of the suit as one for declaratory relief. The hope that motivates casting a request for relief in declaratory terms is that if the declaration is granted, the parties will be able to negotiate the concrete relief necessary to make the plaintiffs whole without further judicial proceedings. No one wants an empty declaration.

Id. at 763-64 (emphasis in original). Therefore, a "declaration" that the Plan violates ERISA may con-

stitute "other appropriate equitable relief," and is a permissible cause of action.

We agree with Plaintiffs, that in the wake of *May* and *Berger*, it appears that the appropriate method to address a pension plan whose terms violate ERISA is for the plaintiff to seek a declaration, pursuant to ERISA § 502(a)(3), that the plan's terms are indeed illegal (for example, because the plan's lump sum distribution provisions result in lump sums smaller than the present value of the normal retirement benefit). At that point, the law implies that the Plan's provisions include such a requirement and benefits are payable pursuant to ERISA § 502(a)(1)(B). Accordingly, we DENY Defendant's Motion for Summary Judgment on Williams's ERISA claim.

IV. Does the Plan comply with ERISA and, if not, were Williams and the Class injured in not receiving the full value of their Accrued Benefit with their lump sum distribution?

Williams alleges that the Plan violated certain sections of ERISA and the Internal Revenue Code by failing to calculate in his and the class's lump sum distributions the value of the COLA enhancement available under the Plan only to those receiving monthly payments of their Accrued Benefit. Specifically, Williams argues that the Plan's definition of "Accrued Benefits" does not satisfy ERISA's definition of that term because the COLA enhancement was not included when calculating the value of his lump sum distribution. The central issue in this litigation is whether the Plan's COLA enhancement, available to those Participants electing a monthly payment option, is an Accrued Benefit under ERISA

and thus also available to Participants who elected the lump sum payment.

ERISA and the Internal Revenue Code mandate that if a defined benefit pension plan provides for a form of payment other than a life annuity beginning at normal retirement age (the "normal retirement benefit"), then this optional form must be the actuarial equivalent of the annuity. Treasury Regulation 1-417(e)-d, 26 C.F.R. §1.417(e)-1d;[7] 29 U.S.C. 1054(c)(3); 26 U.S.C. 411(c)(3). The Seventh Circuit in *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 759 (7th Cir. 2003) (Posner, J.), recently confirmed that the ERISA statutory requirements (as implemented by the Treasury regulations) must be used for valuing a lump sum payment, stating, "ERISA requires that any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit." citing 29 U.S.C. § 1054(c)(3); *May Dep't Stores Co. v. Federal Ins. Co.*, 305 F.3d

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[7] Treasury Regulation 1.417(e)-1(d) states:

> A defined benefit plan must provide that the present value of any accrued benefit and the amount (subject to sections 411(c)(3) and 415) of any distribution, including a single sum, must not be less than the amount calculated using the applicable interest rate described in paragraph (d)(3) of this section (determined for the month described in paragraph (d)(4) of this section) and the applicable mortality table described in paragraph (d)(2) of this section. The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with the preceding sentence. 26 C.F.R. § 1.417(e)-1(d)(1) (emphasis added).

597, 600 (7th Cir. 2002); *Esden v. Bank of Boston*, 229 F.3d 154, 164, 173 (2d Cir. 2000).

ERISA: "Accrued Benefit" and the "Normal Retirement Benefit"

ERISA Section 2(23) defines the term "accrued benefit," in the case of a defined benefit plan, as "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). "It should be apparent that this definition does not purport to describe what counts as an 'accrued benefit' for all participants in all qualifying plans. Rather, the statutory definition is a signpost directing [courts] to look at the terms of the plan at issue." *Board of Trustees of the Sheet Metal Workers' Nat'l Pension Fund v. Comm. of Internal Rev.*, 318 F.3d 599, 602-03 (4th Cir. 2003). The Supreme Court has held that "private parties, not the Government, control the level of benefits" provided in ERISA pension plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). The Seventh Circuit evaluated a similar issue involving an "accrued benefit" in *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir. 1992); in that case, the Seventh Circuit stated:

> The term "accrued benefit" has a statutory meaning, and the parties cannot change that meaning by simply labeling certain benefits as "accrued benefits" and others, such as the COLA, as "supplementary benefits." An accrued benefit is, "in the case of a defined benefit plan, . . . an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23) (1984). We first determine what Congress meant by this definition, and

> then examine the Plan, as a whole, to determine which benefits created by the Plan fall within that definition.

"Accrued" benefits refers to those normal retirement benefits that an employee has earned at any given time during the course of employment. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 635 (7th Cir. 2004). Put another way, "[a]n employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time." *Ashenbaugh v. Crucible Inc.*, 854 F.2d 1516, 1524 (3d Cir. 1988)).

In conducting this analysis, it is also appropriate to consider the views of the agencies responsible for enforcing ERISA; to do otherwise would be to "embark upon a voyage without a compass." *Kohl v. Assoc. of Trial Lawyers of America*, 183 F.R.D. 475, 482 (D. Md. 1998) (quoting *Mead Corp. v. B.E. Tilley*, 490 U.S. 714, 726 (1989) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). The Internal Revenue Code and its supporting regulations expressly exclude from the definition of "accrued benefit" the value of an early retirement subsidy or any subsidized value in a joint and survivor annuity. *See* 29 U.S.C. § 411(a)(7); 29 C.F.R. § 1.411(a)-7(a)(ii). While to date no definition of "retirement-type subsidy" is contained in ERISA, the regulations and the legislative history of ERISA § 204(g)(2) define a benefit subsidy as "the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit." S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574. The legislative history further provides that a retirement-type subsidy is a subsidy that continues

after retirement. S. Rep. No. 575, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

Question 39 from the "Gray Book"[8] of the March 1994 Enrolled Actuaries Meeting asks:

> A plan provides for lump sum distributions based on actuarial equivalent interest rates equal to the PBGC interest rates on lump sums in plan terminations (i.e., the 417(e) rates). The plan also provides for annual post-retirement cost-of-living increases based on the National Cost-of-Living index, but not to exceed 3% in any year. The plan states that for lump sum determination, it is assumed that there would be no increase in the COL index.
>
> RESPONSE
>
> Subject to section 415 (discussed below), an automatic cost-of-living provision is an integral part of the participant's accrued benefit and, therefore, must be taken into account when determining amounts payable under optional forms of benefit. The assumption that there will be no increase in the COL index in determining the lump sum would not be reasonable and, therefore, would result in

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[8] The Enrolled Actuaries Report published by the American Academy of Actuaries in the summer of 2004 states that "[t]he Gray Book is a compilation of IRS responses to questions from pension practitioners regarding unusual situations or areas in which the Internal Revenue Code and regulations are unclear, insufficiently specific, contradictory, or silent." Vol. 29, No. 2 at p. 5.

> the impermissible - forfeiture of accrued benefits under section 411.

AR000 13.

Our research discloses that two courts have considered issues similar to the one presented here, in each case holding that employees were entitled to larger lump-sums because the plans excluded the value of the COLAs. *See Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189, 199-204 (D. Mass. 2001) (Young, C.J.); and *Kohl v. ATLA Pension Plan*, 183 F.R.D. 475 (D. Md. 1998) (Williams, J.). The courts in both *Laurenzano* and *Kohl*, discussed below, primarily and specifically relied on the Seventh Circuit holding in *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992); *See*, *Laurenzano*, 134 F. Supp. 2d at 199, and *Kohl*, 183 F.R.D. at 479.

In *Hickey*, the Seventh Circuit affirmed the trial court's ruling which granted partial summary judgment in favor of the plaintiff employees ruling that the COLA prescribed by the employer's Plan was an accrued benefit and, therefore, its elimination was a decrease of the accrued benefit in violation of ERISA. The Seventh Circuit opinion concluded:

> A participant's right to have his basic benefit adjusted for changes in the cost-of-living accrued each year along with the right to the basic benefit. A participant's entitlement to his or her normal retirement benefit included, as one component, the right to have the benefits adjusted pursuant to the COLA provision.

980 F.2d at 469. See also Treasury Regulation 1.417(a)-7 (defining accrued benefit as an annual

benefit commencing at normal retirement age). In *Hickey*, the Plan had been amended to add a COLA to all retirement benefits. The court noticed that the COLA adjusted the computed benefit rather than providing a separate optional benefit. "A participant's right to have his basic benefit adjusted for changes in the cost-of-living accrued each year along with the right to the basic benefit. A participant's entitlement to his or her normal retirement benefit included, as one component, the right to have the benefits adjusted pursuant to the COLA provision." *Id.* at 469.

In reaching its conclusion in *Hickey*, the Seventh Circuit examined the legislative history which informed the term, "accrued benefit," concluding:

> The 'primary function' of accrued benefits is to 'provide retirement income.' As such, accrued benefits do not encompass such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age when he is entitled to receive current social security benefits. . . .

Hickey, 980 F.3d at 467 (quoting H.R. Rep. N. 93-807, 93rd Cong. 2d Sess. 60 (1974), *reprinted in* II Legislative History at 3180). "The COLA is an accrued benefit: its primary purpose is to provide retirement income, it commences only at retirement, and it is not a benefit generally transferable to succeeding employers." *Id.*

Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust, 134 F.

Supp. 2d 189 (D. Mass. 2001) is a case very similar to the one presently before us. In *Laurenzano*, upon separation of his employment, rather than receive a life annuity, Laurenzano elected to receive a lump sum distribution, which did not include the present value of projected COLA payments. The district court held, "If a defined benefit pension plan normally provides retirement benefits in the form of a life annuity that includes a cost-of-living adjustment ("COLA")," a lump sum distribution in lieu of the annuity must include the present value of the projected COLA payments. *Laurenzano*, 134 F. Supp. 2d at 191 (noting that Section 5.7 of the plan at issue adds a COLA to certain Accrued Benefits while excluding the COLA from lump sum distributions. *Id.* at 192). In *Laurenzano*, the district court held that the plan provided only one definition of accrued benefit, but it was not consonant with the legal definition of "accrued benefit." Under the plan, the "annual benefit commencing at normal retirement age" was an annuity with COLA payments. Given the reality of the plan, as opposed to its legally-meaningless terminology, the "accrued benefit" under the plan included COLA payments. *Laurenzano*, F. Supp. 2d at 200-201. Initially, the plan terms in *Laurenzano* did not clearly exclude the COLA from the plan's accrued benefit definition:

> A Participant's "Pre-1995 Accrued Benefit" shall be subject to an annual [COLA] as of each January 1, beginning the January 1 next following the date benefit payments commence. . . . For purposes of this Section 5.7, a Participant's "Pre-1995 Accrued Benefit" is any portion of the benefit payable to the Participant under the Plan (other than a lump sum benefit) that is attributable to

> such Participant's Accrued Benefit determined as of December 31, 1994 on the basis of the Participant's Final Average Compensation and Credited Service determined as of December 31, 1994.

134 F. Supp. 2d at 192. In *Laurenzano*, the plan's exclusion of the COLA for lump sum distributions was placed in a parenthetical at the end of the plan provision adding the COLA enhancement. In addition, the COLA was discussed in the same plan provision that defined the accrued benefit under the plan.

In *Kohl v. Association of Trial Lawyers of America*, 183 F.R.D. 475 (D. Md. 1998), a pension plan participant brought a class action alleging that the plan administrator violated ERISA by failing to include a COLA when making a lump-sum payment. On cross-motions for summary judgment, the district court held that participants receiving retirement benefits in lump-sum payment were entitled to COLA. In *Kohl*, the court treated the issue as a matter of contract interpretation, determining whether, under the Plan's language, a COLA applied to a lump sum payment or not. The Court noted that under Section 1054 a participant's accrued benefits must be the actuarial equivalent of what her normal retirement benefits would have been when computed under the plan. However, by its own terms, the Plan required the lump sum cash option to be equal to the Value of the 10-year annuity option. *Id.* at 482.

While we have found no case directly on point, our review of circuit court opinions reveals that most courts have construed a COLA as an accrued benefit. *Hickey*, *supra*; *Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plans*, 750

F.2d 1458, 1463 (9th Cir. 1995) ("living pension" which increased age 65 benefit every year is an "accrued benefit"), *cert. denied*, 471 U.S. 1137 (1985); and *Schaefer v. Arkansas Medical Soc.*, 853 F.2d 1487, 1488 (8th Cir. 1988) (affirming unpublished district court decision holding that COLA is an "accrued pension benefit"); *see also, Board of Trustees of Sheet Metal Workers' Natl. Pension Fund v. C.I.R.*, 318 F.3d 599, 605 n.2 (4th Cir. 2003) (COLA granted after employment terminated is not an accrued benefit, distinguishing *Hickey* and *Shaw* because COLA benefits there were earned during period of employment).[9]

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[9] Defendants argue that other federal courts have held that a COLA enhancement does not qualify as an accrued benefit under the relevant plan documents. Defendants cite *Bd. of Trustees of the Sheet Metal Workers' Nat'l Pens. Fund v. Comm. of Internal Rev.*, 318 F.3d 599, 604 (4th Cir. 2003) and *San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union*, No. 93-55108, 1994 U.S. App. LEXIS 13167, * 13-14 (9th Cir. May 19, 1994). In both cases, COLA enhancements were not part of a participant's accrued benefit because the COLAS were not earned as a result of service, but instead were discretionarily granted after a participant's service had concluded and were expressly limited in duration as opposed to for the duration of the participant's post-retirement life. *LaBrosse v. Trustees of the Asbestos Workers Local 47 Ret. Trust Plan*, 186 F. Supp. 2d 791, 796 (W.D. Mich. 2001), deals with increases to dollar amounts used in calculating monthly retirement benefits (from $3 in 1956 to $45 in 1998). *Id.* at 793. The plan document did not guarantee any future increases, and the decisions to provide increases were discretionary. Thus, the Court held that because no obligation ever existed to provide further increases, and (unlike future COLA increases) the retirees had not accrued the right to those increases prior to retirement, the retirees' accrued benefits were not cut-back by a post-

The Defendant Plan cannot contest that some courts have previously found a promised COLA to be an accrued benefit under the plans at issue in those cases. However, Defendant argues that no such COLA benefits were promised under this Plan. Under the Plan's unambiguous terms, Defendant contends, the COLA enhancement available to Participants receiving a monthly payments of their retirement benefits does not qualify as an Accrued Benefit, and the BAC's decision to deny Williams's benefit claim does not violate ERISA. Therefore, the Court should grant the Plan judgment as a matter of law on Williams's class action complaint. Def. Memo in Supp. Of S.J. at 32 - 33.

Defendant seeks to distinguish each of the cases that hold that a COLA is an accrued benefit. In *Hickey*, the Plan at issue specifically provided that the COLA, which was added by amendment, was applicable to all retirement benefits. 980 F.2d at 466-67. In *Kohl*, the Court held that the terms of the plan document at issue control whether a COLA enhancement qualifies as an accrued benefit and determined that the plan document at issue was "unclear as to whether a COLA applie[d] to a lump sum payment or not." 183 F.R.D. at 480. Regarding *Laurenzano*, the Defendant argues that it is inapplicable because it incorrectly applies the definition of accrued benefit under ERISA. Def. Mem. for Summ. J. at 21.

[Footnote continued from previous page]

retirement decision to no longer grant the retirees' additional increases. *Id.* at 796.

Defendant also focuses on a few words in the definition of "accrued benefit" to argue that an "accrued benefit" must be determined by the plan. Defendant asserts that at the time of his termination and retirement on March 31, 1997, Williams stopped accruing benefits under the Plan's terms. Therefore, because a COLA enhancement is available only when the Accrued Benefit is already being paid monthly to eligible Participants, the COLA enhancement could not be considered to be a part of Williams's Accrued Benefit under the Plan. Put another way, an enhancement (the COLA or any other) that becomes payable to a Participant after his retirement date and after he has begun receiving benefits from the Plan cannot qualify as an Accrued Benefit because the enhancement was not earned during the course of employment. Def. Memo in Supp. Of S.J. at 25. In sum, the COLA only becomes a factor after the Accrued Benefit is locked in and the Participant elects a payment method. This analysis dictates that the Plan's SPD correctly states that "the COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law," and the BAC's decision to deny Williams's benefit claim was proper and reasonable. See Facts ¶22; Def. Memo in Supp. Of S.J. at 25.

Defendant further argues that the Plan at issue here unambiguously states that a Participant is only eligible to receive a COLA enhancement after he voluntarily elects to receive his Accrued Benefit in a monthly payment and after he has begun receiving his distribution in monthly payments—which, by the Plan's terms and application, is after the Participant's Accrued Benefit has been calculated. In response to Williams's argument that the COLA "accrued" over the period of his participation in the

Plan, Defendant invokes the Plan's express terms, wherein a Participant does not become eligible to receive a COLA enhancement until (1) he has elected a monthly payment option; (2) he has begun receiving his Accrued Benefit; and (3) his Accrued Benefit is paid through a monthly payment optional form.

We repeat ERISA's definition of "accrued benefit" for emphasis: "Accrued benefit" means "the individual's accrued benefit determined under the plan and, except as provided in [ERISA § 204(c)(3)], *expressed in the form of an annual benefit commencing at normal retirement age.*" ERISA § 3(23) (emphasis added). Thus, as mentioned above, ERISA requires that any Plan definition of "accrued benefit" depends on the "annual benefit commencing at normal retirement age." *See Laurenzano*, 134 F. Supp. 2d at 200.

It is undisputed that the COLA at issue in the case at bar provides retirement income in the form of an annual benefit at retirement age. See Coyle Deposition, p. 31; 1994 Plan, Article XV, AR 00078-79; 2001 Plan, Article X, AR 001 93-94. "The COLA is an accrued benefit: its primary purpose is to provide retirement income, it commences only at retirement, and it is not a benefit generally transferable to succeeding employers." *See Hickey*.

The automatic COLA provided by the Plan is part of the annual benefit payable to a participant for the rest of his or her life. Pl. Memo. in Supp. of Summ. J. at 7; see, e.g., ERISA § 3(23), IRC § 411(a)(7) and Treasury Regulation 1.417(a)-7 (defining accrued benefit as an annual benefit commencing at normal retirement age). Under the Plan (and the law), this increasing annuity stream continues for the rest of the participant's life. See, 1994 Plan,

Article XV, AR 00078-79; 2001 Plan, Article X, AR 00193-94.

Defendant contends that the word "express" found in ERISA's definition of the term "accrued benefit" means only that the Accrued Benefit must be set, as a base, using the monthly single life annuity—not that the benefits will be paid as a monthly single life annuity or that each Participant receives all of the rights and enhancements available under that benefit payment option. Stated otherwise, the COLA enhancement is only provided under the Plan when a Participant elects a monthly distribution payment option—at that time, the Participant's Accrued Benefit will be enhanced as required by the Plan. Because the COLA "accrues," if at all, after a Participant elects to receive payment of his or her benefits through a monthly payment option, the COLA cannot be considered an Accrued Benefit for Participants, like Williams, who voluntarily elected to receive their Accrued Benefit in a lump sum before a COLA could attach. Def. Memo in Supp. of S.J. at 28.

As we have previously noted, "The term 'accrued benefit' has a statutory meaning, and the parties cannot change that meaning by simply labeling certain benefits as 'accrued benefits' and others, such as the COLA, as 'supplementary benefits.'" *Hickey*, 980 F.2d at 468. We know of no court decision to hold that a COLA earned during a period of employment is not an accrued benefit under ERISA. Defendant appears to claim that the COLA exists outside ERISA's protections during the participant's employment, but instantly attaches to his accrued benefit if he chooses the monthly payment option. However, if the COLA is part of the annuity (and it is), then ER-

ISA requires it to be included in the Class's lump sum distributions.

Finally, Defendant argues that Plaintiffs would be unjustly enriched if the Plan were required to add a COLA enhancement to its lump sum distribution. More specifically, Defendant contends that if Williams's lump sum calculation were to include the COLA, he and others receiving a lump sum distribution would be unjustly enriched vis-à-vis other Plan participants because they would effectively receive the value of the COLA twice: once through the monetary growth of their lump sum distribution received through investment since retirement and a second through the valuing of the COLA as monetary damages in this case. Def. Mem. for Summ. J. at 16. Such a result, in itself, would violate ERISA, the Plan contends, because it would grant Williams and the class members benefits greater than those received by other Participants who opted to receive monthly payments.

We believe the Defendant's suggestion that the Class would receive a windfall by receiving the COLA as well as any earned investment income to be factually incorrect. *See, e.g.*, Poulin Report, pp. 2-3. ERISA § 205(g)(3) includes, as part of determining present value, a discount for all years that the participant's age predates his normal retirement age. This discount is computed using market interest rates--currently the 30-year Treasury Bond rate--to reflect the fact that the participant can invest the lump sum. Poulin Report, pp. 2-3. To claim that the Class would somehow receive more under the Plan than participants electing an annuity ignores the fact that the lump sum calculations were already reduced to offset the time value of money.

After careful consideration of the meaning of "accrued benefit" and the terms of the Plan, we hold that this Plan violated ERISA, 29 U.S.C. 1054(c)(3),[10] by failing to include in Williams's and the class members' lump sum distributions the value of the COLA enhancement expressly available to those receiving monthly payments of their Accrued Benefit under the Plan. Specifically, the Plan's definition of "Accrued Benefits" does not satisfy ERISA's definition of that term because the COLA enhancement was not included when calculating the value of his lump sum distribution.[11]

In reaching this conclusion, that a COLA must be deemed an accrued benefit under the circumstances of this Plan when construed in light of ERISA and controlling Seventh Circuit precedent, we acknowledge that substantial complications in administering such a provision may result. COLAs are typically both speculative and contingent, turning on future economic tides which are unknowable at the time a lump sum payment is made, but the fact of such complications in terms of drafting and adminis-

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[10] This section mandates that if a defined benefit pension plan provides for a form of payment other than a life annuity beginning at normal retirement age (the "normal retirement benefit"), then this optional form must be the actuarial equivalent of the annuity.

[11] Because we grant Plaintiffs' motion for summary judgment for the reasons discussed herein, we decline to discuss the three, additional arguments raised by Plaintiffs: that the failing to include the COLA in calculating the lump sum distribution violates the present value requirements of section 205(g), the back-loading rules of section 204(b) and the forfeiture rules of section 203(a).

tering the plans can not alter the results of our analysis.

CONCLUSION

For the above reasons, Defendant's Motion for Summary Judgment is DENIED and Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Date: 12/22/2005

/s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

* * *

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 10, 2007

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 06-2555

GARY WILLIAMS, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Southern District of Indiana, New Albany Division,
v.	No. 04 C 78
ROHM and HAAS PENSION PLAN, *Defendant-Appellant*.	Sarah Evans Barker, *Judge*.

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en

banc* and the judges of the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing en banc are DENIED.

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* Judges Flaum and Rovner took no part in the consideration of this case.

APPENDIX D

THE ROHM AND HAAS COMPANY
RETIREMENT PLAN

(Effective April 1, 2001)

* * *

ARTICLE II - PURPOSE

The primary purpose of the Plan is to provide pension benefits for eligible Employees of Rohm and Haas Company to supplement the retirement income benefits provided under the Social Security Act.

* * *

ARTICLE III - DEFINITIONS

The terms used herein shall have the following meanings, unless a different meaning is clearly required by the context:

3.1 "Accrued Benefit" means that portion of a Participant's Basic Amount of Normal Retirement Pension, expressed in terms of a monthly single life annuity beginning at or after his Normal Retirement Date, that has accrued as of any determination date in accordance with Article VII.

3.2 "Actuarial Equivalent" or "Actuarially Equivalent" means a benefit of equivalent actuarial value to the benefit that would otherwise have been provided to the Employee, determined on the basis of appropriate actuarial assumptions and methods set

forth in Appendices A through D attached hereto. For purposes of determining lump sum present values, the interest rate used shall be:

3.2.1 No greater than the interest rate used by the PBGC to determine the present value of lump sum distributions for plans terminating as of the first day of the Plan Year, if the present value of the benefit (using such rate) does not exceed $25,000; and

3.2.2 No greater than 120% of the rate described in Section 3.2.1, if the present value of the benefit (determined under Section 3.2.1) exceeds $25,000; provided that in no event shall the present value of the benefit determined under this Section be less than $25,000 or greater than the maximum benefit permitted under Section 7.5

* * *

ARTICLE VII - BASIC AMOUNT OF NORMAL RETIREMENT PENSION

7.1 Basic Amount of Normal Retirement Pension. Except as provided in Section 16.1, Section 16.2 and Section 7.5, the monthly Basic Amount of Normal Retirement Pension shall be the applicable amount set forth below:

7.1.1 Salaried and Certain Hourly Employees. Subject to Section 7.1.2 and Section 7.1.3, 1/12th of:

7.1.1.1 1.5% of the Participant's Basic Earnings Rate minus 0.35% of the Participant's Final Average Compensation multiplied by the number of completed years and any fractional parts thereof of Benefit Service up to a maximum of 44 years; plus

7.1.1.2 0.75% of the Participant's Basic Earnings Rate multiplied by the number of completed years and any fractional parts thereof of Benefit Service in excess of 44 years.

In no event, however, will the amount of benefits payable to any Salaried Participant under this Section 7.1.1 be less than the benefit accrued by such Participant as of December 30, 1989 under the terms of the Plan in effect on December 30, 1989.

7.1.2 Hourly Employees of Rohm and Haas Illinois. For Hourly Participants who are employed by Rohm and Haas Illinois the monthly Basic Amount of Normal Retirement Pension shall not be less than:

7.1.2.1 $11 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement through April 30, 1989;

7.1.2.2 $12 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement through April 30, 1990;

7.1.2.3 $13 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after April 30, 1990;

7.1.2.4 $15 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after April 30, 1991; and

7.1.2.5 $17 multiplied by the number of the Employee's completed years and any frac-

tional parts thereof of Benefit Service for retirement after September 30, 1993; and

7.1.2.6 $18 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after November 2, 1994.

7.1.3 Hourly Employees of Rohm and Haas Southern California. For Hourly Participants who are employed by Rohm and Haas Southern California the monthly Basic Amount of Normal Retirement Pension shall not be less than:

7.1.3.1 $5.50 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement through December 31, 1989;

7.1.3.2 $10 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after December 31, 1989 and before January 1, 1991;

7.1.3.3 $11 multiplied by the number of the Employees' completed years and any fractional parts thereof of Benefit Service for retirement after December 31, 1990 and before July 1, 1992; and

7.1.3.4 $14 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after July 1, 1992 and before July 1, 1993;

7.1.3.5 $16 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retire-

ment after July 1, 1993 and before July 1, 1994; and

7.1.3.6 $18 multiplied by the number of the Employee's completed years and any fractional parts thereof of Benefit Service for retirement after July 1, 1994.

7.2 Minimum Benefit. For any active or retired Participant who has completed at least 20 years of Service, the monthly Basic Amount of Normal Retirement Pension shall not be less than $300, payable in the form of a straight life annuity.

7.3 Special Rules for Calculating the Basic Amount of Normal Retirement Pension. The following rules shall apply in calculating the Basic Amount of Normal Retirement Pension payable to a Participant:

7.3.1 Long-Term Disability Allowance Payments. The Basic Amount of Normal Retirement Pension for an Employee who is entitled to service credit from the Plan based upon the receipt of Long-Term Disability Allowance payments in accordance with Section 3.26 shall be computed in accordance with Article VIII or the corresponding provisions of the Prior Plan, whichever provision was applicable at the date of the Salaried Employee's receipt of the Long-Term Disability Allowance.

7.3.2 Salaried Employees of Furane. Salaried Employees of the Furane Products Company will be provided a monthly amount of pension attributable to Benefit Service accrued prior to November 1, 1983 based upon the pension plan formula contained in the Prior M&T Plan, and their Basic Earnings Rate determined in accordance with Sec-

tion 3.9 of this Plan at the earlier of their date of termination or retirement.

7.3.3 Salaried Participants in Plaskon Plan. A Salaried Participant who was a participant in the Plaskon Plan on December 31, 1989 and who is employed by the Company after October 31, 1990 will be provided a monthly pension that is the greater of (i) the pension calculated under the Plaskon Plan with respect to service with Plaskon before December 31, 1989 and calculated under the Plan with respect to service with Plaskon and the Company after December 30, 1989, or (ii) the pension calculated under the Plan with respect to Benefit Service beginning with the Salaried Participant's date of hire by Plaskon.

7.3.4 Actuarial Reduction - All Employees. The annual benefit accrual of a Participant employed after his Normal Retirement Date shall be reduced, but not below zero, by the Actuarial Equivalent of the total Plan benefits distributed to the Participant by the close of the Plan Year. For purposes of this Section, "total Plan benefits" shall not include any part of a distribution that exceeds the amount that would have been distributed to the Participant under the Plan's applicable normal form of payment.

7.4 Extended Wear-away Provisions - Effective December 31, 1994. Unless otherwise provided under the Plan, each section 401(a)(17) Employee's Accrued Benefit under this Plan will be the greater of the Accrued Benefit determined for the employee under 7.4.1 or 7.4.2 below:

7.4.1 the Employee's Accrued Benefit determined with respect to the benefit formula applicable for the Plan Year beginning on or after December

31, 1994, as applied to the section 401(a)(17) Employee's total Benefit Service, or

7.4.2 the sum of:

7.4.2.1 the section 401(a)(17) Employee's Accrued Benefit as of December 30, 1994, frozen in accordance with Treas. Reg. § 1.401(a)(4)-13, and

7.4.2.2 the section 401(a)(17) Employee's Accrued Benefit determined under the benefit formula applicable for the Plan Year beginning on or after January 1, 1994, as applied to the section 401(a)(17) Employee's Benefit Service credited to the section 401(a)(17) Employee for Plan Years beginning on December 31, 1994.

A "section 401(a)(17) Employee" means an Employee whose current Accrued Benefit as of a date on or after the first day of the first Plan Year beginning on or after January 1, 1994, is based on a Basic Earnings Rate for a Plan Year beginning before December 31, 1994, that exceeded $150,000.

7.5 Limitation on Annual Benefits - Code Section 415.

7.5.1 Primary Limit. In no case shall the annual benefit with respect to any Participant payable under the Plan and all other defined benefit plans maintained by the Company, when expressed in the form of a straight life annuity, exceed the lesser of:

7.5.1.1 $90,000 (or such other amount as may be prescribed under regulations issued by the Secretary of the Treasury under section 415(d) of the Code) multiplied by a fraction (which may not exceed one), the numerator of

which is the number of the Participant's years of participation in the Plan and the denominator of which is 10; or

7.5.1.2 the greater of $10,000 or 100% of the Participant's average annual Compensation received during the three consecutive calendar years of his participation during which he receives the greatest aggregate annual Compensation, multiplied by a fraction (which may not exceed one) the numerator of which is the number of the Participant's Years of Service and the denominator of which is 10. The $10,000 limit shall not apply if the Participant participates in any defined contribution plan maintained by the Company.

7.5.1.3 If a Participant's benefit is payable in any form other than a straight life annuity, the determination as to whether the limitation of this Section 7.5.1 has been satisfied shall be made by adjusting such benefit to the form of a straight life annuity using an interest rate equal to the greater of 5% or the interest rate provided Appendix D.

However, for purposes of such adjustment, any ancillary benefit that is not directly related to retirement income benefits and that portion of any joint and survivor annuity that constitutes a Qualified Joint and Survivor Annuity shall not be taken into account.

7.5.1.4 To the extent provided under regulations issued by the Secretary of the Treasury, the reductions in maximum annual benefits described in this Section 7.5.1 shall be applied separately with respect to each change in the benefit structure of the Plan.

7.5.1.5 If a Participant was a Participant in this Plan on July 1, 1982, Section 7.5.1 shall not reduce that Participant's benefit below his Accrued Benefit determined as of September 30, 1983.

7.5.2 If a Participant retires either before or after the Participant's Social Security Retirement Age, the limit of Section 7.5.1 shall be adjusted in accordance with section 415(b) of the Code and the regulations thereunder:

7.5.2.1 In the case of a benefit payable to a Participant beginning before he reaches his Social Security Retirement Age, to an amount that is the equivalent of an annual benefit equal to such limit beginning at his Social Security Retirement Age, using an interest rate at least equal to the greater of 5% or the interest rate provided in Appendix D. The adjustment provided for in the preceding sentence shall be made in the manner prescribed by the Secretary of the Treasury, which is consistent with the reduction for old-age insurance benefits beginning before the Social Security Retirement Age under the Social Security Act; or

7.5.2.2 In the case of a benefit payable to a Participant beginning after he reaches his Social Security Retirement Age, to an amount that is the equivalent of an annual benefit equal to such limit beginning at his Social Security Retirement Age, using an interest rate equal to the lesser of 5% or the interest rate provided in Appendix D.

7.5.3 Notwithstanding anything to the contrary in Sections 7.5.1 and 7.5.2, in the case of an Employee who was a Participant as of the first day of

the first Limitation Year beginning after 1986, the limitations of this Section 7.5 shall not cause such Participant's benefit under all defined benefit plans maintained by the Company to be less than his Accrued Benefit under the Plan determined as if the Employee had terminated employment on December 31, 1986, when expressed as a straight life annuity. In determining the amount of a Participant's Accrued Benefit, (a) any change in the terms and conditions of the Plan after May 5, 1986, and (b) any cost-of-living adjustments occurring after 1986 shall be disregarded.

7.5.4 Combined Limit. If a Participant participates in one or more defined benefit plans and one or more defined contribution plans, or a welfare benefit fund as defined in section 419(e) of the Code, or an individual medical account, as defined in section 415(l)(2) of the Code, the sum of the defined benefit fraction and the defined contribution fraction for any Limitation Year shall not exceed 1.0.

7.5.4.1 Defined Benefit Fraction. The defined benefit fraction for any Limitation Year is a fraction (i) the numerator of which is the Participant's projected annual benefit (determined as of the close of the Limitation Year) under all such Defined Benefit Plans (whether or not terminated), and (ii) the denominator of which is the lesser of (A) $90,000, or the applicable dollar limit for such Limitation Year multiplied by 1.25 (1.0 if the Plan is a super top-heavy plan, as defined in Section 20.3), or (B) the Participant's average annual Compensation for the three consecutive calendar years of active participation, that produce the highest average, multiplied by 1.4.

7.5.4.2 Defined Contribution Fraction. The defined contribution fraction for any Limitation Year is a fraction (i) the numerator of which is the total of the amount treated as annual additions, under section 415(c) of the Code, to the Participant's accounts as of the close of the Limitation Year under all defined contribution plans maintained by the Company (whether or not terminated), and (ii) the denominator of which is the lesser of the following amounts determined for the Limitation Year and for each prior Limitation Year for which the Participant was an Employee (regardless of whether any Plan was in existence during such year):

(A) $30,000, or the applicable dollar limit for each such Limitation Year, multiplied by 1.25 (1.0 if the Plan is a Super Top-Heavy Plan), or

(B) 35% of the Participant's Compensation, as defined in Section 3.14, for each such Limitation Year.

7.5.4.3 Transitional Rule: The denominator of the defined contribution fraction under Section 7.5.4.2 for all Limitation Years ending before January 1, 1983 shall, at the Administrative Committee's election, be the denominator determined for the Limitation Year ending in 1982, multiplied by a fraction, (i) the numerator of which is the lesser of $51,875 or 35% of the Participant's 1981 compensation and (ii) the denominator of which is the lesser of $41,500 or 25% of the Participant's 1981 compensation.

* * *

ARTICLE XI - AMOUNT OF PENSION PAYABLE AT RETIREMENT

11.1 Amount of Pension. The amount of pension payable to a Participant under the normal form of payment shall be determined by reducing the Basic Normal, Early or Special Early Retirement Pension otherwise determined in accordance with Article VII, Article VIII, or Section 9.1, and, if applicable, Article XIX, by 100% of such Participants' Statutory Benefits and multiplying this amount by the factor set forth in Section 11.1.1 and by the factor set forth in Section 11.1.2 or 11.1.3:

11.1.1 100% minus the sum of (i) .0417% multiplied by the total number of full calendar months that the optional preretirement death benefit for a Spouse, described in Section 13.6, was in effect for the Participant and the Participant's Spouse from the time the Participant was age 55 through age 60 and no months, plus (ii) .0583% multiplied by the total number of full calendar months that said death benefit was in effect from the time the Participant was older than age 60 and no months but in each case only with respect to periods prior to August 23, 1984 or December 31, 1984 as set forth in Article XIII.

11.1.2 In any situation where the straight life annuity is the normal form of payment, such factor will be 100%.

11.1.3 Except as provided in Section 12.4, in any case where the Contingent Annuitant Annuity form is the normal form of payment, such factor will be the Actuarially Equivalent factor, established by the Administrative Committee, which factor takes into account the age of the Participant and the Participant's Contingent Annuitant. Actuarial Equiva-

lent values shall be determined as specified in Appendix D.

* * *

ARTICLE XII - OPTIONAL FORMS OF RETIREMENT INCOME BENEFITS

12.1 Optional Forms. A Participant, other than an Hourly Participant employed by Rohm and Haas Illinois or Rohm and Haas Southern California may elect, in writing prior to actual retirement, to convert the pension otherwise payable to the Participant after retirement into a benefit of Actuarially Equivalent value in accordance with one of the options set forth below:

12.1.1 Option A: A pension payable during the Participant's life with the provision that after death a pension equal to 100%, 75%, 66 2/3%, 50%, or 25% of the Participant's pension, as the Participant may elect, shall be continued during the life of, and shall be paid to, such person as the Participant shall have designated as Contingent Annuitant in a written notice of election; provided, however, that if the Contingent Annuitant is not the Spouse of the Participant, the Actuarially Equivalent value of the pension payable to the Contingent Annuitant, determined at the Participant's retirement date, shall not be greater than 50% of the Actuarially Equivalent value of the pension the Participant would have received without having elected this Option A; or

12.1.2 Option B: A pension payable during the Participant's life with the provision that if the Participant should die before receiving 60, 120, 180 or 240 monthly pension payments, as the Participant may elect, the Participant's Beneficiary shall receive the Commuted value of the balance of the 60, 120,

180 or 240 monthly pension payments, whichever is applicable, in such manner as shall be determined by the Administrative Committee; or

12.1.3 Option C: A pension payable during the Participant's lifetime with no further payments due after the last day of the month following or coincident with the date of the Participant's death.

12.1.4 Option D: A lump sum distribution of the Actuarial Equivalent value of the Participant's vested Accrued Benefit, determined in accordance with Appendix D.

12.1.5 Option E: A direct trustee-to-trustee transfer of the Actuarial Equivalent value of the Participant's Accrued Benefit, as determined in accordance with Appendix D, to an "eligible retirement plan," as defined in section 401(a)(31)(D) of the Code.

12.2 Death Before Annuity Starting Date. If an election is made under Option A above and the death of either the Participant or the designated Contingent Annuitant occurs prior to the Participant's Annuity Starting Date, the election shall be void. However, if such an election is made and the death of either the retired Participant or the designated Contingent Annuitant occurs after the Participant's Annuity Starting Date, the election shall remain in effect.

12.3 No Designated Beneficiary. If benefits become payable under Option B and no designated Beneficiary survives the retired Participant, the Administrative Committee may designate a Beneficiary in the following order of priority: wife or husband, children (including adopted children), next of kin, dependents of the Participant, a trustee under a deed

of trust established by the Participant, or the Participant's executor or administrator (but in no event the Company) and direct payment of such benefits to the Beneficiary thus designated in such amounts and in such manner as in its sole judgment is advisable.

12.4 Optional Forms for Certain Hourly Participants. Hourly Participants who are employed by Rohm and Haas Illinois or Rohm and Haas Southern California may elect the following optional forms of benefit, subject to the rules concerning spousal consent as described in Section 10.4:

12.4.1 A pension payable during the Hourly Participant's life, reduced by 10%, with the provision that after the Hourly Participant's death a pension equal to 50% of the Hourly Participant's pension shall be paid to the Hourly Participant's Beneficiary;

12.4.2 A pension payable during the Hourly Participant's life, reduced by 15%, with the provision that after the Hourly Participant's death a pension equal to 66 2/3% of the Hourly Participant's pension shall be paid to the Hourly Participant's Beneficiary;

12.4.3 A pension payable during the Hourly Participant's life, reduced by 20%, with the provision that after the Hourly Participant's death a pension equal to 100% of the Hourly Participant's pension shall be paid to the Hourly Participant's Beneficiary;

12.4.4 A pension payable during the Hourly Participant's life, reduced by 7%, with the provision that if the Hourly Participant should die before the Hourly Participant has received 120 monthly pension payments, the Hourly Participant's

Beneficiary should receive the commuted value of the balance of the 120 monthly pension payments; and

12.4.5 A pension payable during the Hourly Participant's life, reduced by 13%, with the provision that if the Hourly Participant should die before the Hourly Participant has received 180 monthly pension payments, the Hourly Participant's Beneficiary should receive the commuted value of the balance of the 180 monthly pension payments.

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ARTICLE XV - COST-OF-LIVING ADJUSTMENTS TO PENSIONS

15.1 Amount of Cost-of-Living Adjustment. Except as provided in Sections 15.3 and 15.4, beginning with pension payments in March, 1974 (March 1975 for Rohm and Haas Texas Incorporated) and each March thereafter, any Participant age 60 or older who has retired from the Company, or any Contingent Annuitant or Beneficiary of an eligible Participant (or a Participant who would have been eligible except for age), who is receiving monthly payments, shall be entitled to an annual Cost-of-Living Adjustment as described below:

15.1.1 For Salaried Participants, or any Contingent Annuitant or Beneficiary of an eligible Salaried Participant, the initial Cost-of-Living Adjustment payable to the otherwise eligible Participant on the March 31st subsequent to the year of retirement will be provided at the rate of 1/12 for each full month of retirement during the preceding calendar year;

15.1.2 Subsequent Cost-of-Living Adjustments for Salaried Participants and the initial Cost-

of-Living Adjustments payable to all other otherwise eligible Participant (or Contingent Annuitant or Beneficiary of an eligible Participant, or a Participant who would have been eligible except for age) shall be the full amount of the adjustment otherwise provided by this Section (and without regard to Section 15.1.1, for Salaried Participants). However, such adjustments shall not apply to the supplemental benefits provided for by Sections 8.2 and 8.3, or Section 9.1. The Cost-of-Living Adjustment shall be equal to the percentage increase in the United States Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W Revised) from the previous December to the December of the year immediately preceding such March 31 adjustment date, subject to the following additional conditions and limitations:

15.1.2.1 in no event shall the Cost-of-Living Adjustment in pension in any year be greater than 3%;

15.1.2.2 should the increase in such Consumer Price Index be in excess of 3% in any year, the amount of such excess shall not be carried forward to any succeeding year; and

15.1.2.3 there shall be no decrease in the amount of a Participant's pension by reason of any decrease in such Consumer Price Index that might take place in any year. However, for any year(s) for which this Section applies, determination of any subsequent increase in the Cost-of-Living Adjustment will be made using the last highest December level of the CPI-W Revised and not the level of the previous December.

15.2 Time of Adjustment. Any such adjustment shall be payable with the pension payment for the month of March following the close of such calendar

year in an amount determined by Sections 15.1.1 (if applicable) and 15.1.2 of this Section as well as Section 15.3. In the event a Participant retires in accordance with the provisions of Section 8.1.2, or Section 9.1, such adjustment for increases in the Cost-of-Living shall not become effective until the March 31 coincident with or next following the attainment of age 60 (and without regard to the limitation imposed by Section 16.1.1).

15.3 Participants Eligible for Age 56/30 Years Supplemental Benefit. A Participant who is eligible for and elects to receive the Supplemental Benefit set forth in Section 8.3, shall be eligible for the aforementioned Cost-of-Living Adjustment in accordance with the following schedule:

Participant's Attained Age at the Time of Retirement	Cost-of-Living Adjustment to be effective on the March 31 Coincident with or Following the Participant's
At least 59 years but less than 60 years	61st birthday
At least 58 years but less than 59 years	62nd birthday
At least 57 years but less than 58 years	63rd birthday
At least 56 years but less than 57 years	64th birthday

However, a Contingent Annuitant or Beneficiary (who elects to continue receiving monthly payments) who survives a retired Participant covered by this Section shall be entitled to the annual Cost-of-Living Adjustment provided for in this Section beginning with the March 31 coincident with or next following the death of the Participant regardless of the Participant's age at the time of death.

15.4 Inapplicability. This Section shall not be applicable to Salaried Employees of Romicon, Furane Products Company, or EMCA, or Hourly Employees of Rohm and Haas Illinois or Rohm and Haas Southern California,

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APPENDIX D – ACTUARIAL EQUIVALENT VALUES

Effective December 30, 1984

Option(s):

Straight Life Annuity Converted into Actuarial Equivalent Options other than a Lump Sum:

Interest Rate	Mortality Table
7%	1984 PBGC Unisex Table

Straight Life Annuity converted into Actuarial Equivalent Lump-sum payment.

Interest Rate	Mortality Table
* Prior to October 1, 1980	6% per annum
October 1, 1980	9-1/2% per annum
January 1, 1981	The Plan's Enrolled Actuary will determine quarterly the average interest rate used by major
November, 1985	

	insurance companies providing single-sum immediate annuities for individuals between ages 50 and 65. If the arithmetic average interest determined changes by at least one half (1/2) of one-percent from the interest rate currently in effect, the new interest rate will be implemented beginning with the next Calendar quarter for lump-sum distributions. If lump-sum termination values decline in the future under the above mentioned procedures, the lump-sum termination value payable shall not be less than the "frozen" termination value determined as of September 30, 1980.
December, 1985	The Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date). If the interest rate for the month following retirement declines, the

	lower rate will be used to adjust the lump sum payment.
January 1, 1987	For Participants less than age 50, the Pension Benefit Guaranty Corporation's interest rates for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date).
	For Participants age 50 or older, the Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date). If the interest rate for the month following retirement declines, the lower rate will be used to adjust the lump sum payment.
1992 Voluntary Early Retirement Date	For a Salaried Participant retiring before 1995 on his Voluntary Early Retirement Date, 6.25%

1994 Voluntary Early Retirement date	For an Hourly Participant retiring under the VRP Program in 1994, 5.25%
1995 Voluntary Early Retirement Date	For an Hourly Participant retiring under the VRP Program in 1995, 5.00%
1994 Separations Under the Involuntary Early Retirement Program	For separations during 1994 under the Involuntary Early Retirement Program: (i) for purposes of valuing a Participant's supplemental pension benefit, the Pension Benefit Guaranty Corporation's interest rate for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date), and (ii) for purposes of valuing a Participant's regular pension benefit: (x) the Pension Benefit Guaranty Corporation's interest rates for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if the Participant is less

	than age 50, or (y) the Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if Participant is age 50 or older.
Separations Between January 1, 1995 and March 31, 1997	For separations between January 1, 1995 and March 31, 1997 the lesser of (i) annual rate of interest on 30-year Treasury securities for the month before the date of distribution, or (ii) the greater of (x) 6%, or (y) the applicable interest rate determined below. For purposes of valuing a Participant's supplemental pension benefit, the Pension Benefit Guaranty Corporation's interest rate for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date). For purposes of valuing a

Participant's regular pension benefit: (x) the Pension Benefit Guaranty Corporation's interest rates for valuing deferred monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if the Participant is less than age 50, or (y) the Pension Benefit Guaranty Corporation's interest rate for valuing immediate monthly annuities for plans terminating as of the proposed distribution date (or benefit commencement date) if Participant is age 50 or older. For participants retiring outside of the Involuntary Early Retirement Program, if the interest rate for the month following retirement declines, the lower rate will be used to adjust the lump sum payment.

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APPENDIX E

Rohm and Haas Company
Retirement Plan

Summary Plan Description

Based on the
Plan as amended
through May, 2002

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What is a "COLA" and am I eligible to receive it?

The cost of living adjustment or "COLA" is an annual adjustment to monthly payments from the Plan intended to keep pace with inflation. The amount of the annual increase is based on the increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the previous year but is limited to no more than 3% of your annual benefit in any year.

If you, your spouse, contingent annuitant, or other beneficiary, are receiving monthly benefit payments under the Plan, beginning at age 60 your monthly benefit will be adjusted to reflect the COLA.

The COLA only applies to monthly payments; it does NOT apply if you receive your benefit in the form of a cash lump sum.

The COLA is a benefit enhancement which is not part of your Accrued Benefit under the Plan and is not required by law. The Plan may, at its discretion, eliminate the COLA at any time, regardless of whether it has made COLA payments in the past.

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